86-2039

NO. 87 -

Supreme Court, U.S.
FILED
APR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

*SUPREME COURT OF THE UNITED STATES*

October Term , 1986

---

SAMUEL OKIN,

Appellant,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

---

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

# JURIDICTIONAL STATEMENT

SAMUEL OKIN,
Appellant,
241 Sands Avenue,
Las Vegas, Nevada 89109
(702) 735-0884

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED

L. May the Court of Appeals and the Tax Court negate undisputed tax benefits of $ 18,276.90 through statutory income averaging of his adjusted gross income of $ 99,432 by excluding from the determination of the adjusted gross income to be included in the computation of alternative minimum taxable income, appellant's Treasury Dept. Schedule G (Income Averaging) attached to appellant's tax form 1040, pursuant to statutory provisions, wherein it is computed that $ 89,465 of said adjusted gross income is averageable income, or as computed in respondent's schedule G (made part of the Tax Court's order by incorporation, that the averageable income is $ 91,308, and by starting in the said computation of alternative of alternative minimum taxable income, not with the figure of $ 24,386 computed in said respondent's schedule G in name

of appellant (respondent's computation statement schedule 2) which appears to be average adjusted gross income) but with the initial adjusted gross income of $ 95,732 thereby increasing the alternative minimum taxable income by the sum of $ 71,340 and thereby creating an alternative minimum tax of $ 18,957 and a tax deficiency of $ 18,957, and negating the tax benefits of $ 18,276.90 through income averaging (supra).

2. When appellant elected to income average his adjusted gross income for the computer year 1940, by attaching his said Treasury Dept. Schedule G to his Tax Form 1040, as directed by statute, did his statutory election average his adjusted gross income for the year 1980 for all purposes or only for the purpose of computing his computation of income averaging as referred to

in the opinion of the Court of Appeals and Tax Court or was the computation of income avera ging established for all purposes including the computation of alternative minimum taxable income and tax.

3. Where section 1304 of the Internal Revenue Code provides that the income averaging provisions of the Code shall not be available to certain sections of the Internal Revenue Code but not including section 55, did the Court of Appeals and the Tax Court err in concluding in their opinion that the income averaging provisions of the Code are not available in the determination of the alternative minimum taxable income to be included in the computation of the alternative minimum tax under section 55.

4. Is section 55 of the Code, an integral part of the Internal Revenue Code, interwoven with the other sections,

and not separate as referred to in the opinion of the lower Courts.

5. Where the Tax Court in its order made the respondent's computation the findings of the Tax Court by incorporation the said Tax Court's order, and where as part of the said respondent's computation, there was included as Schedule 2 ( Treasury Department Schedule G (in name of appellant)(Income Averaging, Form 1040) wherein it stated that of the adjusted gross income of appellant for the year 1980, the taxable income from tax form 1040 is $ 97,432 and that 30% of the adjusted gross income of the base period of $ 20,412 is $ 6,124 and that the averageable income is $ 91,308, by incorparing the said computation in the said Tax Court's order (supra), are not the said findings are undisputed and are not both the Tax Court and the Court of

Appeals precluded from making any findings contrary thereto and contrary to the computation in said respondent's Schedule G (Computation Schedule 2) that the figure of $ 24,386 is averageable income, and was it not error for the Court of Appeals to affirm the computation of the Tax Court wherein it started with a base of $ 95,732 instead of the said figure of $ 24,386, thereby creating the alternative minimum tax and tax deficiency.

6. May the Court of Appeals affirm a Tax Court order which is contrary to its undisputed findings of fact.

7. If section 55 of the Code can be interpreted as negating tax benefits of a taxpayer pursuant to the income averaging provisions of the Code; because of the existence of preferential income, whereas other taxpayers who have the same statutory benefits of income

ave raging but no preferential income under sec tion 55 retain the statutory tax benefits, does this not create a discriminatory situation contrary to the Constitution.

## PARTIES TO THE PROCEEDING

Appellant respectfully states that there mo kmown interested parties other than the parties listed in the caption of the case.

## ADDITIONAL SUPPLEMENT TABLE OF CONTENTS

The part of the conference report accompanying H.R. 8363, respecting the enactment of the alternative minimum tax for non-corporate taxpayers, is printed as Appendix G.

## OPINIONS BELOW

The opinion of the Circuit Court dated January 26,1987, is printed as Appendix A. The opinion of the Tax Court, dated August 1485, is reported at 49 T.C.M (CCH) 1315 (1985) and reprinted as Appendix B.

## SUPPLEMENTAL TABLE OF CONTENTS

The decision of the Tax Court dated August 14, 1985, is reprinted as Appendix D and the computation of the appellee incorporated in the said decision is reprinted as Appendix E.

The judgment of the Circuit Court filed and entered on January 26, 1987 is reprinted as Appendix C.

The notice of appeal dated February 17, 1987, mailed Januray 17, 1987, was filed by the Circuit Court Clerk on March 2,1987 is reprinted as Appendix F.

The amended notice of appeal dated Feb-

ruary 20, 1987, mailed February 21, 1987, was filed by the Circuit Court Clerk on March 2, 1987, is reprinted as Appendix F(1).

The second amended notice of appeal dated March 14, 1987, mailed March 16, 1987, was filed by the Circuit Court Clerk on March 20, 1987, is reprinted as Appendix F(2).

## JURISDICTION

The said judgment of the Circuit Court dated January 26, 1987, is final and the United States Supreme Court has jurisdiction of this appeal under U. S. C. Sec. 1254(2).

## TABLE OF AUTHORITIES

STATUTES — Page

I.R. C. Secs. 1301-1305 (26 U.S.C.secs. 1301-1305.....passim

I. R. C. sec. 1305.....10

I. R . C. sec. 1304 .....10-11 passim

I. R. C. sec. 55.....passim

REGULATION OF SECRETARY OF TREASURY 10

CASES

Beckman v. United States, 396 Fed.Supp. 44-50.....20-21

Riley v. Commissioner, 66 T.C. 141 (1976).....passim

Stockwell v. Commissioner, 736 F. 2d 1051 (1984),,,passim

CONSTITUTIONAL PROVISIONS

Contingent constitutional issue.....

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED..... 1

PARTIES TO THE PROCEEDING.....iii

OPINIONS BELOW-JUDGMENT, DECISION, COMPUTATION.....iv

TABLE OF AUTHORITIES..... v

JURISDICTION .....VI

STATUTE AND RULE INVOLVED.....vii

CONSTITUTIONAL PROVISIONS.....vii

STATEMENT OF THE CASE..... 1

THE QUESTIONS ARE SUBSTANTIAL..... 8

A. THE NINTH CIRCUIT S DECISION NEGATES THE APPELLANT S UNDISPUTED TAX SAVINGS PURSUANT TO THE INTERNAL REVENUE CODE (secs. 1301-1305, AND IS CONTRARY TO THE UNDISPUTED FINDINGS OF THE TAX COURT AND WITHOUT ANY SUPPORT IN THE RILEY AND STOCKWELL CASES CITED IN ITS DECISION.....

(1) THE TAX COURT S ORDER INCORPORATES THE FACTS RECITED IN THE RESPONDENT S COMPUTATION AS THE FINDINGS OF THE COURT

(a) THE SAID COMPUTATION OF THE RESPONDENT INCLUDED A MODIFIED TREASURY DEPARTMENT SCHEDULE G (INCOME AVERAGING) IN THE NAME OF APPELLANT_-TAXPAYER, WHEREIN IT IS FOUND THAT OF THE ADJUSTED GROSS INCOME OF THE APPELLANT FOR THE TAXABLE YEAR 1980 IN THE AMOUNT of $ 97,432, the sum of $ 91,208 IS AVERAGEABLE INCOME AND THAT IN THE COMPUTATION OF TAX IT WAS COMPUTED THAT $ 6,124 (30%) OF THE TOTAL $ 20,412 OF

PAGE

THE BASE PERIOD INCOME PLUS 20% OF THE AVERAGE-ABLE INCOME $ 18,262 , TOTAL $ 24,386 (WHICH APPEARS TO BE THE AVER-AGE ADJUSTED GROSS INCOME)

(2) THE NINTH CIRCUIT S DECISION IS IS CONTRARY TO SECTION 1304 OF THE INTERNAL REVENUE CODE WHICH PRESCRIBED WHAT PROVIS-IONS OF THE INTERNAL REVENUE CODE INCOME AVERAGING IS INAPPLICABLE (NOT INCLUDING SEC- 55). 8

(3) THE NINTH CIRCUIT S DECISION CITING THE RILEY AND STOCK-WELL DECISIONS IS NOT SUP-PORTED AS THE SAID RILEY AND STOCKWELL DECISIONS ARE WHOLLY DISTINGUISHABLE AS INVOLVING THE TAXPAYER'S ATTEMPT TO

OBTAIN NON-EXISTING STATUTORY TAX BENEFITS THROUGH EITHER INCOME AVERAGING OF PREFERENTIAL INCOME SUCH AS DEDUCTED CAPITAL GAINS (RILEY CASE), OR THE AVERAGING OF THE "ADD-ON" TAX UNDER THE PREDECESSOR SECTION %¢ (STOCKWELL CASE), WHEREAS IN THE APPELLANT S CAUSE, THE APPELLANT S STATUTORY RIGHT TO INCOME AVERAGING IS UNDISPUTED AS FOUND BY THE TAX COURT, AND APPARENTLY NOT DISPUTED IN THE CIRCUIT S RULING.

B. THE NINTH CIRCUIT S DECISION NEGATES THE APPELLANT S UNDISPUTED TAX SAVINGS PURSUANT TO THE INTERNAL REVENUE CODE (INCOME AVERAGING- Sec. 1301-1305) AND IS CONTRARY TO UNDISPUTED FINDINGS OF FACT AS

INCORPORATED IN THE DECISION OF THE TAX COURT, AND IS WITHOUT ANY S UPPORT IN THE RILEY AND STOCK-WELL CASES CITED IN THE TAX COURT AND CIRCUIT OPINIONS.

A(1) THE RILEY AND STOCKWELL DECISIONS, WHERE THE TAXPAYER ASSERTED NON-EXISTING STATUTORY CLAIMS OF DEDUCTED CAPITAL GAINS AND OR TAX, ARE W HOLLY INAPPLICABLE IN THE INSTANT CAUSE WHERE THE APPELLANT UNDISPUTEDLY HAS THE STATUTORY RIGHT TO INCOME AV-AGEING AND WHERE THE TAX COURT UNDISPUTEDLY HAS FOUND AS ITS FINDINGS OF FACT BY INCORPORA-TING IN ITS DECISION THE COM-PUTATION OF THE RESPONDENT IN-CLUDING A MODIFIED TREASURY DEPARTMENT SCHEDULE G ( IN NAME OF THE APPELLANT) WHEREIN IT

IS COMPUTED THAT OF THE APPELL-
ANT S ADJUSTED GROSS INCOME OF
$97,432, THE SUM OF $ 91,308 IS
AVERAGEABLE INCOME.

A(2) THE CIRCUIT COURT S RULING IM-
PLIES A CONCEPT OF SEGREGATION
TO SECTION 55 OF THE I.R.C. IN
ITS INTERPRETATION OF SECTION
55 AS SEPARATE. 16

A(2)(A) THE CIRCUIT COURT S RULING
PURPORTS TO REVIEW THE UNDIS-
PUTED FINDINGS OF FACT OF THE
TAX COURT WHEN IT INCORPORATED
IN ITS DECISION AS ITS FIND-
INGS OF FACT, THE UNDISPUTED
COMPUTATION IN THE RESPOND-
ENT S SCHEDULE G (INCOME AV-
ERAGING) IN THE NAME OF AP-
PELLANT, WHEREIN IT IS FOUND
THAT OF THE SUM OF ADJUSTED
GROSS INCOME OF $ 97,432, THE
SUM OF $ 91,308 IS AVERAGEABLE

INCOME AND THAT $ 6,124 (30%
OF THE BASE PERIOD INCOME
$ 20,412) PLUS 20% ($16,202)
OF THE AVERAGEABLE INCOME,
TOTALS $ 24,326 WHICH IS
OBVIOSULY AVERAGE INCOME.

A(2)(B) THE CIRCUIT AND THE TAX COURTS HAD NO STATUTORY AUTHORITY THROUGH ANY INTERPRETATION OF SEC TION 55 TO NEGATE THE MANDATE OF THE STATUTORY IMPACT OF SECTION 1304 OF THE I.R. C. RESPECTING THE DESIGNATION OF THE INTERNAL REVENUE CODE WHERE THE INCOME AVERAGING PROVISIONS WERE INAPPLICABLE BUT NOT DESIGNATING SECTION 55 55 AS ANY SUCH SECTION.

(a) THE RULING OF THE CIRCUIT AND TAX COURTS HAVE

THE EFFECT OF LEGISLATING BY THEIR EXCLUSION OF SECTION 55 FROM THE IMPACT OF THE INCOME AVERAGING PROVISIONS (SEC. 1301-1305) WHICH OBVIOUSLY IS NOT THE PROVINCE OF THE COURTS TO INCREASE OR DECREASE STATUTORY IMPACT.

## STATEMENT OF CASE

During a routine audit of the appellant's tax return for the year 1980, the appellee's computer, which apparently had not been programmed to provide for the inclusion of Treasury Department Schedule G (Income Averaging) in the determination of the alternative minimum taxable adjusted gross income to be included as a base f r the computation of the alternative minimum tax under Section 55 of the Internal Revenue Code, produced a computer print-out with respect to Section 55, supra, wherein there was excluded appellant's said Treasury Department Schedule G (Income Averaging) attached to appellant!tax form 1040, pursuant to the provisions of the Internal Revenue Code and the Regulation of the Secretary of the Treasury, promulgated pursuant to specific statutory authority whereby appellant elected to income average his adjusted gross income of $95,733 appearing in said Tax Form 1040, and in which said appellant's Schedule G (Income averaging), it was computed that of the

$ 95,732, the sum of $ 89,465 was averageable income, and as part of the computation of tax, therein, it was computed that $6,268 (30% of the base income) and 20% ($17,873) of the averageable income ($95,733) totaled $ 24,161, which is obviously the average income, and in place of the said sum of $ 24,161, the appellee's computer was programed to exclude the computation in said appellant's Schedule G (Income Averaging) and to insert, as in the determination of the adjusted gross income, not the said sum of $ 24,161, but the initial said sum of $ 95,732.00, thereby increasing the alternative minimum taxable income by the sum of $ 71,570, and thereby creating a alternative minimum tax of $ 17,947.60 and a tax deficiency of $ 18,255.70 and thereby negating and nullifying the tax saving of $ 18,276.90, and thereby increasing the appellant's

tax to $ 51,770, as though Schedule G (income averaging) never existed.

THE NEGATION AND NULLIFICATION OF THE APPELLANT s UNDISPUTED TAX BENEFITS UNDER THE INCOME AVERAGING PROVISIONS OF THE INTERNAL REVENUE C O DE UNDERLIES THE GRAVAMEN OF THE APPELLANT S COMPLAINT.

The appellant filed a petition with the United States Tax Court for a redetermination of the tax deficiency of $ 18,255.70 for the year 1980.

On April 24, 1986, the United States Tax Court filed its Memorandum Findings of Fact and Opinion, and thereafter the appellee filed its computation statement wherein there was included a modified Treasury Department Schedule G (Income Averaging) in the name of appellant, wherein it was computed that of the sum of adjusted gross income of $ 97,432, after deducting 30% ($ 6,134) from the

said adjusted gross income of $ 97,432, that the sum of $ 91,308 was averageable income, and that in computing the tax, the said sum of $ 6,138 plus $ 18,262 (20% of the averageable income of $91,308, totalled $ 24,386, which is obviously the aversge income, and significantly no other figure has been suggested by respondent-appellee.

Also included in the appellee·s said computation, was a c mputation of the alternative minimum tax, wherein there was inserted in handwriting, the sum of $ 95,732 in place of the aforesaid sum of $ 24,386 appearing in the said appellee·s Schedule G (income averaging) supra, thereby increasing the amount alternative minimum taxable income of the appellant to be used as the base for the computation of the alternative minimum taxable income by the sum of $71,346,

and thereby creating an alternative minimum tax of $ 18,957 and a tax deficiency of $ 18,255.70.

The United States Tax Court on August 14, 1985, entered its Order and Decision which states:

DECISION

> Pursuant to the opinion of the Court filed April 24,1985, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is
>
> ORDERED AND DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1980 in the amount of $ 18,255.70.
>
> (signed) W. M. DRENNEN
>
> Entered: August 14,1985

At this point it is to be noted that on January 27, 1986, in response to the notice from the appellee for the payment of the aforesaid sum of $ 18,255.70 and interest of $ 15,541.97, making a total of $ 33,706.77, the appellant under noted

protest sent his check for $ 33,706.77, wherein there was noted:

> "Paid under protest because of appeal in Ninth Circuit Court of Appeals."

and on appellee s printed demand received by appellant and returned by him with the aforesaid check, appellant wrote:

1/27/86

> "Notice and demand for payment of $ 33.706.77 received today. Because of pending appeal in United States Circuit Court of Appeals, Ninth Circuit, $ 33,706.77 is being paid under protest
> Samuel Okin "

Appellant duly filed his Notice of Appeal to the United States Court of Appeals for the for the Ninth Circuit on October 23, 1985 and the expiration of the period for the filing of the said appeal was October 12, 1985.

After the submission of briefs by the appellant and the respondent and on or about May 20, 1986, appellant received from the Clerk of the Circuit, a

notice, containing the following:

> "The United States Court of Appeals for the Ninth Circuit is considering submission of your case without argument. Pursuant to Ninth Circuit Rule 3(f), you have ten (10) days from the receipt of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. Please send an original and three (3) copies of your statement to the Clerk's Office in San Francisco, and show proof of service on opposing counsel.
>
> The court welcomes additional citations, without oral argument, of relevant decisions rendered since filing of a party's last brie Rule 28(3) of FRAF). Send an original and three (3) legible copies to me, on letter size paper, with proof of service on all parties."

In response to the foregoing and within the said 10 day period, appellant filed with the Ninth Circuit, the following:

> " APPELLANT'S STATEMENT UNDER RULE 3(f) OF NINTH CIRCUIT IN REPLY TO CLERK S NOTICE UNDER SAID RULE RECEIVED ON MAY 31, 1986
>
> The appellant respectfully objects to any submission of this appeal without oral argument in

that appellant contends that such procedure will be highly prejudicial to the appellant's appeal.

Appellant respectfully states that the many aspects of the appellant's opening and reply briefs (totaling 45 pages) evidence the many reasons why there should be oral argumentof the appeal thereby particularly enabling the appellant to buttress the contents of the said briefs, and also thereby affording the appellant an opportunity to appear before the Court and answer any question respecting the appeal which the oral argument may cause to emanate from the Court.

It is the contention of appellant that oral argument is an integral part of the appeal and that the submitted briefs are not a substitute for oral argument.

Another phase of this appeal which appellant contends necessitates oral argument,is the appellant's assertion in his briefs of the contingent question of the constitutionality of Section 55 of the Internal Revenue Code, which appellant contenfs resulted from the Tax Court's opinion and decision, and which appellant intended to support during the oral argument.

Appellant contends that oral argument is an integral part of due process of appellate procedure and that the elimination of oral argument raises the constitutional question

question of a violation of the due process clause of the United States Constitution.

Finally, appellant asserts that the sum of $ 18,255.70, which the Tax Court determined to be a tax deficiency for the year 1980, should because of the large amount, warrant oral argument of this appeal.

CONCLUSION

Appellant respectfully asks that there be oral argument of this appeal.

Respecfully submitted

Samuel Okin,
Petitional-Appellant
#241 Sands Avenue,
Las Vegas, Nevada,
702-735-0884 "

Thereafter under date of August 20, 1986, appellant received from the Clerk of the Circuit Court, a letter containing the following:

"Upon due consideration of your objection to submission of this case without oral argument, the Court has decided that oral argument is not necessary.

On August 12, 1986, your case was submitted for decision to Judges Tang, Ferguson, and Hall,CJJ, you will be promptly notified by mail when the case id decided."

The Circuit Court Clerk thereafter sent to appellant a copy of the decision of the Circuit Court dated the 26th day of January, 1987.

Because the said Circuit decision affirming the order of the Tax Court, used the term "Do Ordered" at the conclusion thereof, and appellant being uncertain as to whether under the Ninth Circuit procedure a formal order is entered, appellant duly served and filed a notice of appeal in the Circuit Court to the United States Supreme Court from the said order and decision of the Circuit Court affirming the decision of the said Tax Court.

Thereafter appellant received from the Clerk of the Circuit Court, a copy of a letter from the said Clerk of the Circuit Court to the Clerk of the United States Tax Court, wherein the said Clerk referred to the inclusion of a "decree"

of the Circuit Court, w hich said letter was dated February ;7, 1987. Appellant telephoned the office of the Clerk of the Circuit Court, and asked for a copy of the said Decree of the Circuit Court, and was told that appellant would have to ask the Clerk of the Tax Court for a copy, and upon further imquiry was informed that the decree was dated February, 1987.

In order to avoid any possible default respecting the proper identification and date of the order of the Circuit Court, appellant duly served and filed an Amended Notice of Appeal in respect to a Circuit Court decree in this cause dated February 17, 1987. Promptly appellant telephoned the Clerk of the Tax Court amd requested a copy of the "decree" of the Circuit Courtin this cause. Subsequently, appellant received from the

Clerk of the Tax Court, a document of the Circuit Court in this cause, dated and entered on January 26, 1987, titled a "JUDGMENT" of the Circuit Court for the Ninth Circuit.

While appellant believed that the appellant's original Notice of Appeal which referred to the Order and Decision of the Circuit Court, probably was sufficient, nevertheless in order to be absolutely accurate, appellant duly and promply served a second amended Notice of Appeal referring to an appeal from the Judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed the order and decision of the United States Tax Court (supra).

Appellant respectfully states that he believes that the unusual circumstances on this case, which necessitated the service snd filing of not only the

the Notice of Appeal to the Supreme Court of the United States, but also the service and filing of an amended and second amended notice of appeal.

THE QUESTIONS ARE SUBSTANTIAL.....

A. THE NINTH CIRCUIT S DECISION NEGATES THE APPELLANT S UNDISPUYED TAX SAVINGS PURSUANT TO THE INTERNAL REVENUE CODE (SEC. 1301-1305, AND IS CONTRARY TO THE UNDISPUTED FINDINGS OF THE TAX COURT AND WITHOUT ANY SUPPORT IN THE RILEY AND STOCKWELL CASES CITED IN ITS DECISION.....

(1) THE TAX COURT·S ORDER INCORPORATES THEREIN THE FACTS RECITED IN RESPONDENT·S COMPUTATION AS THE FINDINGS OF THE COURT

(a) THE SAID COMPUTATION OF THE RESPOMDEMT INCLUDES A MODIFIED TREASURY DEPARTMENT

SCHEDULE G (INCOME AVERAG-
ING) IN NAME OF THE APPELL-
ANT-TAXPAYER. WHEREIN IT IS
FOUND THAT OF THE ADJUSTED
GROSS INCOME OF APPELLANT
FOR THE TAXABLE YEAR 1980
IN THE AMOUNT OF $ 97,432,
THE SUM OF $ 91,308 IS AV-
ERAGEABLE INCOME AND THAT
IN THE COMPUTATION OF TAX
IT WAS COMPUTED THAT $6,124
(30%) OF THE TOTAL $20,412
OF THE BASE PERIOD INCOME
PLUS 20% OF THE AVERAGEABLE
INCOME $ 18,262, TOTALS
$ 24,386 (WHICH APPEARS TO
BE THE AVERAGE ADJUSTED
GROSS INCOME)

(2) THE NINTH CIRCUIT S DECISION
IS CONTRARY TO SECTION 1304
OF THE INTERNAL REVENUE CODE

WHICH PRESCRIBES WHAT PROVISIONS OF THE INTERNAL REVENUE CODE INCOME AVERAGING IS INAPPLICABLE ( NOT INCLUDING SECTION 55

(3) THE NINTH CIRCUIT S DECISION CITING THE RILEY AND STOCKWELL DECISIONS IS NOT SUPPORTED AS THE SAID RILEY AND STOCKWELL DECISIONS ARE WHOLLY DISTINGUISHABLE AS INVOLVING THE TAXPAER S ATTEMPT TO OBTAIN NONEXISTING STATUTORY TAX BENEFITS THROUGH INCOME AVERAGING, WHEREAS IN THIS CAUSE THE APPELLANT·S STATUTORY RIGHT TO INCOME AVERAGING IS UNDISPUTED AS FOUND BY THE TAX COURT.

The Tax Court's order states:

> "Pursuant to the opinion of the Court filed April 24, 1985, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is
>
> * * *

The respondent;s said computation dated July 2, 1985, included a modified Schedule G (Income Averaging) in the name of appellant, wherein it is stated:

COMPUTATION OF AVERAGEABLE INCOME

| | | |
|---|---|---|
| &. | Taxable income for 1980 from Schedule TC (Form 1040). Part 1, line 2,,,,,,,,,,,,,,,,,,,, | $97,432 |
| 11 | Adjusted taxable income..... | 97,432 |
| 12 | Add columns (a) through (d) line 6..... | 20,412 |
| 13 | Enter 30% of line 12..... | 6,124 |
| 14 | Averageable income (subtract Line 13 from line 11).... | 91,308 |

COMPUTATION OF TAX

| | | | |
|---|---|---|---|
| 15 | Amount from line 13 ..... | | 6,124 |
| 16 | 20% of line 14..... | | 18,262 |
| 17 | Total (add lines 15 and 16). | | 24,386 |
| 19 | Total (add lines 17 and 18). | | 24.386 |
| 20 | Tax on amount on line 19 .. | | 7,088 |
| 21 | Tax on amount on line 17 | $7,088 | |
| 22 | Tax on amount on line 15 | 739 | |
| 23 | Subtract line 22 from line 21..... | 6,349 | |
| 24 | Multiply the amount om line 23 by 4..... | | 26,396 |
| 28 | Tax ( add lines 20 and 24 | | 32,484 |

Internal Revenue Code (sec. 1305) stated:

" Regulations- The Secretary shall prescribe such Regulations as may be necessary to ca rry out the purposes of this part."

The Regulation of the Secretary of the Treasury promulgated pursuant to specific statutory authority vested in him, stated:

"CHOICE OF INCOME AVERAGING BY TAXPAYER

(a) Choice by taxpayer. The income averaging provisions apply to the taxable year only if the taxpayer chooses to have the benefits of income ave raging for such taxable year. The taxpayer shall signify his choice by making jis return for the computation year on form 1040 and attaching Schedule G, Income Averaging thereto."

It is undisputed that the appellant , in compliance with the foregoing statutory provisions, made his tax return on Tax Form 1040 and attached thereto Treasury Tax Form Schedule G, Income Averaging (both said Form 1040 and SChedule G (Income Averaging) are part of Exhibit A.

At this point, because of its importamce, appellant repeats w hat he said previously respecting the provision in the Tax

Court s decision and order incorporating the computation of the respondent as the findings of the Court, which computation included a modified Schedule G ( Income Averaging) in the name of appellant, referred to at length, supra, wherein the averagable oncome of the appellant's adjusted gross income was ncluded as well as a computation under a formila whereby the average income was determined as part of the computation of the tax in the said Schedule G.

Section 1304 of the Internal Revenue Code stated:

(a) Taxpayer must choose benefits. This part shall apply to the taxable year only if the taxpayer chooses to have the benefits of this part for such taxable year.

(b) Certain provisions inapplicable.

If the taxpayer chooses the benefits of this part f.r the taxable year, the following provisions shall not apply to him for such year

(1) Section 911 (relating to citizens or residents of the United States living abroad) and

(2) Subpart D of part III of subchapter N(sec. 931 and following, relating to income from sources within the United States).

At this point it is to be significantly noted that neither yhe Circuit Court nor the Tax Court in their opinion discuss the statutory impact of the forefoing Section 1304 respecting the subject of the inapplicability of the income averaging provisions of the Internal Revenue Code in seeking to sustain the exclusion of the income averaging provisions from the determination of the alternative minimum taxable income, by the respondent. initially in his computer print-out, where no provision, apparently, was made in the programing for income averaging, so that in the absence of any regulation of the Secretary of the Treasury respecting Section 55 of the

Internal Revenue Code, the person making the computation print-out, proceeded as though Schedule G of the Treasury Department , supra, never existed, and the computer print-out issued a computation of alternative minimum tax based on the original adjusted gross incomeof $ 95,732, instead of the average income of $24,386. thereby increasing the alternative minimum taxable income by the sum of $71,346 and creat ing an alternative minimum tax of $ 18,957 and a deficiency tax of $ 18,255.70, and thereby the appellant s undisputed Congressional Tax Bene fits of $ 18,276.90 has been negated and the appellant is compelled to pay total taxes of $ 51,770 instead of $ 33,493.10, just as any taxpayer who has no statutory right to elect to income average his adjusted gross income but has the same a djusted gross income.

The Circuit Court s opinion, as well as the Tax C ourt rely on their interpretation of the language of Section 55 of the Internal Revenue Code to support their conclusion that the Income Averaging provisions are not applicable because the said Section 55 is referred to as an additional tax with provisions which are in the Court·s opinion separate whereas the Tax Court interpreted them to be separate and "imposed and co,puted independently.

Appellant contends that the fact that Section 55 was a separate sec t ion of the Code or the fact that the said Section 55 created an an additional tax with its own formula for the computation of the tax, dpes not make the said provisions of Section 55 , either separate or independent of the balance of the Internal Revenue Code, in effect segregating the said Section 55 from the other sections of the Internal Revenue Code.

It is appellant s contention that every section of the Internal Revenue Code, when necessary is interwoven with a l l the other sections of the Code and that str ct statutory interpretation, in the acsence of any contrary statutory language, nrvrddiyayes a statutory interpretation that all of the sections of the Internal Revenue Code, be interpreted consistent with each other.

It is impotyant to note, at this point that no where in either the opinion of the Circuit or the Tax Court, is there any reference to the legislative history of the enactment of said Section 55 or its predecessor section 56, to the fact that there ever was the s lightest intent intent on the part of Congress, or the Congressional Committees who drafted the lefislation respecring Section 55 or 56, to negate the tax benefits of the income averaging provisions of the

Internal Revenue Code. Actually and decisively, the fact that Section 1304 did not exclude section 55 from the applicability of the income averaging provisions from the interpretation or impact of section 55, it is difficult for the appellant to understand how the Circuit Court and Tax Courtcould conclude that the income averafing provisions are inapplicable to the interpretation of Section 55.

The appellant contends that the Riley and Stockman cases, where the taxpayer sought to establish n on-existing statutory right to income averaging, are no support for th e said Courts conc lusions.

Appellant notes that both Circuit Court and the Tax Court cite reference to text in Bittker, Federal Taxation of Income, Estates and Gifts, secs. 111,511, 111,3.2 (1981), neither discission refers to Beckman v. United States, 306 Fed. Supp

44, where the Court said (p.50):

"The purpose of Section 1301 is to ease abnormal tax burdens created by receipt of long-term compensation received in one year by allocating such bunched income over the period in which it was earned. Payne v. United States ( Ct. Cls. 1974) 409 F. 2d 1404, 1406. The statute is intended to put the taxpayer, if he makes this choice, in essentially the same position as if the fee (or earnings) had been earned ratably during each of the years. United States v. Behle (10 Cir. 1963, 310 F. 2d 134, 136."

(emphasis supplied)

The Circuit Court says (p.7):

"3. Purpose of Alternative Minimum Tax:

(2) I. R. C. 1301-1305 allow income averaging for 'the tax imposed by section 1.' Income averaging is designed to ease the burden of a progressive tax rate-schedule on a taxpayer with widely fluctuating or rapidly rising income. 4 B Bittker, supra, 111.3.13, at 111.70. The provisions do not alter the taxpayer's income for the given year. Rather they reduce the rate at which that income is taxed. Thus, in a case such as Okin's, where a large capital gain is realized in one year, the provisions lower the tax rate in a compensatory fashion to equal, ideally, the rate(s) that would have applied had the income been spread evenly over the proceeding base period

years and the tax year in question. See generally id. "

THE FOREGOING PORTION OF THE CIRCUIT COURT'S OPINION THUS RAISES AT THIS TIME THE STATUTORY QUESTION OF THE IMPACT OF THE STATUTORY SCHEDULE G BY APPELLANT PURSUANT TO THE INTERNAL REVENUE CODE (supra

IT IS TO BE SIGNIFICANTLY NOTED, AGAIN, THAT THE LEGISLATIVE HISTORY OF THE CONGRESSIONAL ENACTMENT OF SECTION 55 DOES NOT INDICATE THE SLIGHTEST INTENT ON THE PART OF CONGRESS TO NEGATE THE TAX BENEFITS OF SECTIONS 1301-1305OF THE INTERNAL REVENUE CODE BY THE ENACTMENT OF SECTION 55. PREFERENTIAL INCOME, SUCH AS CAPITAL GAINS WERE THE TARGET OF THE ENACTMENT OF SECTION 55 AND NOT A COLLATERAL ATTACK ON THE STATUTORY TAX BENEFITS OF ELIGIBLE TAXPAYERS.

THE APPELLANT CONTENDS THAT SCHEDULE G OF THE TREASURY DEPARTMENT WAS DESIGNED

TO CREATE A MECHANISM BY WHICH THE SUBJECT TAX RETURNS OF AN ELIGIBLE TAXPAYER WOULD BE MODIFIED WITH THE SAME FORCE AND AS THOUGH THE SUBJECT TAX RETURNS WERE ACTUALLY AMENDED.

CONGRESS INTENDED TO SUBJECT DEDUCTED CAPITAL GAINS (PREFERENTIAL INCOME TO SOME TAX, BUT NOT TO NEGATE THE STATUTORY TAX BENEFITS OF INCOME AVERAGING.

THUS IT IS TO BE NOTED THAT A TAXPAYER WITH THE SAME ADJUSTED GROSS INCOME AND THE SAME PREFERENTIAL INCOME (CAPITAL GAINS) BUT NO STATUTORY RIGHT TO INCOME AVERAGING, WOULD PAY HARDLY ANY ALTERNATIVE MINIMUM TAX.

APPELLANT OBSERVES THAT THE FOREGOING REFERENCE TO THE CIRCUIT COURT S OPINION, SUPRA, APPEARS TO INDICATE THE QUESTIONING BY THE CIRCUIT COURT OF THE UNDISPUTED FINDINGS OF FACT OF THE TAX COURT RESPECTING THE RESPONDENT S COMPUTATION

CONTAINING A MODIFIED TREASURY DEPARTMENT SCHEDULE G (INCOME AVERAGING) WHEREIN IT IS COMPUTED, UNDISPUTEDLY, THAT $91,308 OF THE APPELLANT S A JUSTED GROSS INCOME OF $ 97,432 IS AVERAGEABLE INCOME.

APPELLANT CONTENDS THAT THE CIRCUIT COURT HAS NO STATUTORY POWER TO REVIEW THE FOREGOING UNDISPUTED FINDINGS OF FACT OF THE TAX COURT, AND THAT THE FOREGOING EXPRESSION OF THE CIRCUIT COURT IN ITS OPINION RESPECTING THE PRO RATING OF INCOME, IS WITHOUT STATUTORY FOUNDATION.

IT IS SUBMITTED THAT THE FINDINGS OF THE TAX COURT AS REFLECTED IN THE SAID RESPONDENT S COMPUTATION INCLUDING A MODIFIED SCHEDULE G, IN THE NAME OF APPELLANT, COMPUTING WHAT APPEARS TO BE AVERAGE INCOME $24,386, IS BEYOND ANY STATUTORY REVIEW BY THE CIRCUIT COURT.

THE COURT OF APPEALS, AS DID THE TAX COURT, CITE THE RILEY AND STOCKWELL CASES

TO SUPPORT THE EXCLUSION OF THE TAX COURT'S DETERMINATION RESPECTING THE UNDISPUTED COMPUTATION OF AVERAGEABLE INCOME AND SAID AVERAGE INCOME. THE RILEY AND STOCKWELL CASES ARE WHOLLY DISTINGUISHABLE, IN THAT IN BOTH CASES THE TAXPAYER SOUGHT TO ESTABLISH NON-EXISTING STATUTORY BENEFITS OF UNCOME AVERAGING, WHICH THE COURT REJECTED.

IN THE CAUSE BEFORE THE COURT, IT IS UNDISPUTED THAT THE APPELLANT HAS THE UNDISPUTED STATUTORY RIGHT TO ELECT TO INCOME AVERAGE HIS ADJUSTED GROSS INCOME, AND THAT THE APPELLANT DULY ELECTED TO EXERCISE THAT ELEVTION, AND THE ELECTION AND IMPACT OF SAID ELECTION (SCHEDULE G - INCOME AVERAGING) CANNOT BE THE SUBJECT OF ANY REVIEW BY THE CIRCUIT COURT.

IT IS TO BE SIGNIFICANTLY NOTED THAT THE INTERNAL REVENUE CODE SPECIGICALLY EMPOWERS <u>ONLY</u> THE TAXPAYER, WITHIN A SPECIFIED TIME TO TERMINATE SUCH ELECTION.

AND IN EFFECT THE LOWER COURTS HAVE TERMINATED THE SAME.

A(1) THE RILEY AND STOCKWELL DECISIONS, WHERE THE TAXPAYER ASSERTED NON-EXISTING STATUTORY CLAIMS OF AVERAGING OF DEDUCTED CAPITAL JAINS AND TAX, ARE WHOLLY INAPPLICABLE IN THE INSTANT CAUSE WHERE THE APPELLANT UNDISPUTEDLY HAS THE STATUTORY RIGHT TO INCOME AVERAGING AND WHERE THE TAX COURT UNDISPUTEDLY HAS FOUND AS ITS FINDINGS OF FACT BY INCORPORATING IN ITS DECISIONS THE COMPUTATION OF THE RESPONDENT INCLUDING A MODIFIED TREASURY DEPARTMENT SCHEDULE G ( IN NAME OF APPELLANT) WHEREIN IT IS COMPUTED THAT OF THE APPELLANT;S ADJUSTED GROSS INCOME OF $ 97,432, <u>THE SUM OF $ 9k,308. IS AVERAGEABLE INCOME</u>.

At the outset. appellant emphasizes the issue before the Court in the instant

cause, is not the deducted capital gains, which are preferential incomeand the subject of taxation under section 55 of the Internal Revenue Code, but rather the negating of the statutory impact of the income averaging of the adjusted gross oncome as f und by the Tax Court.

At no time jas the appellant contended thst sny psrt of the deducted capital gains ($ 136,030.80) is averageable and the Circuit Court opinion refers to the entire amount of $ 136,030.80, which is preferential income subject to the providions of Section 55 of the Internal Revenue Code.

This appeal poses the substantial question as to whether the Circuit Court and the Tax Courterred in excluding the undisputed findings of fact as incorporated in the Tax Court's Decisions respecting the compuattion of averageable income of the appellant which was excluded by the Circuit Court and the Tax Court in the

determination of the adjusted gross income to be included in the computat on of the alternative minimum taxable incomeunder Section 55 of the Internal Revenue Code; and contrary wise, by the inclusion of the initial adjusted gross income of $97,432. be f ore income averaging, instead of the average income of $ 24,386, as appears in the a foresaid respondent s Schedule G (Income Averaging), incorporated in the Tax Court s Decision, as its findings of fact (supra), thereby increasing the alternative minimum taxable income by the sum of $ 73,046 and thereby creating an alternative minimum tax of $ 18,957 and a tax deficiency of $ 18,255.70.

A(2) THE CIRCUIT COURT S RULING IMPLIES A CONCEPT OF SEGREGATION OF SECTION 55 OF THE I.R.C. IN ITS INTERPRETION OF SECTION 55 AS SEPARATE.

The Circuit Court said (p.6):

"Okin maintains that his alternative minimum tax should be computed not by starting with $ 99,432, the figure representing adjusted gross omcome, but rather with $ 25,105.28 w hich Okin refers to as his average annual adjusted gross income. This $ 25,105 figure is derived from Okin's computation of his section 1 tax under the income averaging provisions of sections 1301-1305.

(1) Okin's interpretation is incorrect.By the plain ,eaning of its text, the alternative minimum tax provision applirs 'in addition' to other provisions. I.R.C. sec.55. The income averaging provisions by by their terms, apply only to the ta x imposed by section 1. The pro-provisions are therefore separate. The reference to gross income in section 55(b)(1) in unambiguous, it does not refer to section 1301-1305, vice-versa. Also, the provisions of sections 1301-1305 could have no effect on ;gross income; because the income averaging provisions intended to adjust the rate of taxation, not the amount OF GROSS INCOME. See, generally 4 B Bittker, Federal Taxation of Income, Estates and Gifts. sec.111.3.13* 191."

(emphasis supplied)

---

"The forms themselves support this analysis. For 1980, form 6231 was used for computation of alternaminimum tax, on line 1, the adjusted gross income correspondents with form 1040 line 12, which is the adjusted gross income prior to calculation of income averaged income."

A(2)(A) THE CIRCUIT COURT'S RULING PURPORTS TO REVIEW THE UNDISPUTED FINDINGS OF FACT OF THE TAX COURT WHEN IT ONCORPORATED IN ITS DECISION AS ITS FINDINGS OF FACT, THE UNDISPUTED COMPUTATION IN THE RESPONDENT S SCHEDULE G (INCOME AVERAGING) IN THE NAME OF APPELLANT, WHEREIN IT IS FOUND THAT OF THE SUM OF ADJUSTED GROSS INCOME OF $ 97,432, THE SUM OF $ 91,308 IS AVERAGEABLE INCOME AND THAT $ 6,124 (30% OF THE BASE PERIOD INCOME ($ 20,412 PLUS 20% ($18,262) OF THE AVERAGEABLE INCOME, TOTALS $ 24,386, OBVIOUSLY AVERAGEABLE INCOME.

The foregoing, appellant contends, wholly distinguishes the Stockwell and Riley decisions from the questions posed on this appeal.

In Stockwell v. C. I. R., 730 F.2d 1051, the Court said (p. 1051):

> " This appeal poses the question whether the minimum tax imposed on individual tax preference items under former section 56 (now ORC section 55, USC sec. 55), is subto the income averaging provisions of IRC secs. 1301-1305, 26 U.S.C. secs. 1301-1305. The Commissioner determined that the averaging provisions did not apply. The Tax Court agreed. We affirm.
>
> * * *
>
> In computing their taxable income for 1978, the Stockwells averaged their income under sections 1301-1305. They also averaged the minimum tax on the tax preferemce items."

and further (pp. 1051-1052):

> "The Stockwells took the issue to the Tax Court which upheld the Commissioner's determination of defiency on the basis of its previous ruling in Riley v. CIR. 66 T.C. 141 (1976). The question is one of first impression.
>
> For purposes of Sec. 56. capital gains are items of tax preference.

and further (p. 1052):

> "For purposes of this part, the items of tax preference are -
>
> * * *
>
> Capital gains.
>
> Income averaging, a legislative tax grace, permits of a spreading of income to levelout peak years.
> ....."

(emphasis supplied)

IT IS UNQUESTIONABLY CLEAR FROM THE FOREGOING THAT THE COURT REJECTED THE TAXPAYER S CONTENTION OF A NON-EXISTING STATUTORY RIGHT TO AVERAGE THE MINIMUM TAX ON TAX PREFERENCE ITEMS AND NOT THE APPLICATION OF INCOME AVERAGING.

In appellant's cause, there is no question of any contention that the minimum tax on the tax preference items is to be averaged. Consequently the Circuit Court and the Tax Court erred in asserting the Stockwell decision as support for their decisions.

In Riley v. Commissioner (66 T.C. 141, (1976), the Court said:

> "Sections 1301-through 1305 do not provide a mechanism by which the minimum tax on tax preference income can be averaged."

It is crystal clear from the foregoing that in both the Stockwell and Riley decisions, the question poseed was whether the statute permitted the averaging of the tax on tax preference items which were the subject of the "add-on" tax under section 56 of the Internal Revenue Code and not subject of an additional tax under section of the Internal Revenue Code.

Obviously there is <u>not</u> the slightest comparision to the question posed on this appeal respecting the exclusion by the Circuit Court , as well as the Tax Court of the undisputed findings of fact of the Tax Court, when it incorporated in its decision, the respondent s appellee's computation, wherein there was included a modified Treasury Department Schedule G

(in name of appellant), wherein it was undisputedly computed that of the appellant's adjusted gross income of $ 97,432, the sum of $ 91,308 was averageable income, and that 30% ($6,124) of the base period income of $ 20,412, plus 20% (%18,202) of the averageable income of $ 91,308, totals $ 24,386/, which is obviously average income , by the Treasury Department formula.

Simple mathamatics would compute the average as one-fifth of the total($117,844) of the averageable income of $ 91,303 plus the 30% (6,124 of the base income), resulting in a figure of $ 23,568, the diference being the deducted 30%.

The Circuit Court said (p.6):

" The gramen of Okin's complaint is that the Commissionser's computation under I. R. C. sec. 55 virtually nullify his tax savings under the income averaging provisions. In this case section 55 does have that effect. But this result is not contrary to congressional intent. Although section

55 increases Okin's total tax, his capital gain deductions overall decreased his total liability under sections 1 and 55 by almost one-third of what it would otherwise have been. Thus, both congressional concerns in enacting section 55- tax on gains and incentuve for capital formation are served. See 4 B. Bittker, supra p.5 sec.1111.3.12, at 1111.67 to 68.

* * *

5 The Tax Court noted that Okin's section tax computed without income averaging would be $ 51,770 instead of $ 33,493.10. Thus on his section 1 taxes, Okin would save $ 18,276.90 by income averaging . However, his tentative alternative minimum tax as computed by the Commissioner is $ 51,440.70. Since this amount is imposed to the extent that it exceeds the regular tax, Okin's total liability (regular and alternative minimum tax) would be $ 51,770 without incpme averaging, compared with $ 51,440.70 with income averaging. Hence, the effect of the imposition of the alternative is that by income averagingOkin saves only $ 329.30 instead of $ 18,276.90. See Okin 49 T. C. M. (CCH) at 1318.n.10)."

(emphasis supplied)

IT IS IMPORTANT TO NOTE THAT NO WHERE IN THE OPINIONS OF EITHER THE CIRCUIT Court or the Tax Court IS THERE ANY REFERENCE TO THE LEGISLATIVE REPORTS OF THE CONGRESSIONAL COMMITTEES WHICH ACCOMPAN-

IED THE ENACTMENT OF SEC. 55 OF THE INTERNAL REVENUE CODE, TO SUPPORT THE CONCLUSIONS OF THE CIRCUIT COURT AND THE TAX COURT THAT SECTION 55 WAS INTENDED TO NULLIFY AND NEGATE THE STATUTORY IMPACT OF TAX SAVINGS UNDER THE INCOME AVERAGING PROVISIONS BY THE ENACTMENT OF SAID SECTION 55 OR THAT THE PROVISIONS OF SECTION 1304 OF THE INTERNAL REVENUE CODE, RESTRICTING THE INAPPLICABILITY OF THE INCOME AVERAGING PROVISIONS WERE TO INCLUDE THE ABSENT REFERENCE TO SEC. 55.

THE AVERAGEABLE INCOME OF $ 91,208, TOTALS $ 24,386, WHICH APPELLANT CONTENDS IS THE AVERAGE INCOME FOUND BY THE TAX COURT

Appellant contends that these undisputed findings of the Tax Court are not reviewable by the Circuit Courtand that on this appeal no question is posed respecting the finding that $ 91,308 of the appellant's a djusted gross income of

$ 97,432 is averageable income or that $ 24,386 is AVERAGEABLE INCOME.

A(2)(b) APPELLANT CONTENDS THAT THE IMPOSITION OF A PARTICULAR OR ADDITIONAL TAX (SEC. 55), DOES NOT ALTER THE UNDERLYING UNDISPUTED FINDING OF FACT BY THE TAX COURT OF THE AVERAGEABLE INCOME.

It is appellant's contention when appellant, pursuant to statute, elected to average his income by attaching his Treasury Department Schedule G (Income Averaging) to his tax form 1040 for the year 1980, that the income of the appellant for the computer year(1980) and the base four years, was forthwith averaged and remain averaged subject to the statutory right of the taxpayer to terminate the election within the statutory period.

Appellant contends that Treasury Department Schedule G, is a statutory mechanism

conceived by the Treasury Department pursuant to its statutory authority to effectuate a consolidated modification of the subject tax returns to reflect income averaging without the necessity of physically amending the subject tax returns but having the statutory impact.

It is appellant's contention that the Circuit Court's ruling that:

> "...Also, the provisions of sections 1301-1305 could have no effect on 'gross income' because the income averaging provisions are intendedto adjust the rate of taxation, not the amount of gross income....."

is contrary to the opinion in Beckman v. v. United States, 396 Fed. Supp. 44,50 where the Court said (p.90):

> "The purpose of sec. 1301 is to ease abnormal tax burdens created by receipt of long-term received in one year by allocating such 'bunched' income over the period in which it was earned . Payne v. United States (Ct. Cls. 1974) 469 F. 2d 1404,1406. The statute is intended to put the taxpayer, if he makes choice, in essentially the same position as if the fee (or earnings) had been earn-

ed ratably during each of the years. Uniedv. Behle, (10 Cir. 1963, 310 F. 2d 134, 136)."

(emphasis supplied)

IN ANY EVENT, IT IS THE APPELLANT S CONTHAT THE UNDISPUTED FINDINGS OF THE TAX COURT RESPECTING THE COMPUTATION OF AVERAGEABLE INCOME, IS CONTROLLING AND THAT THE CIRCUIT COURT HAD NO STATUTORY POWER TO REVIEW THE SAID FINDINGS OF FACT (SUPRA).

A(1)(B) THE CIRCUIT COURT S RULING INFERING THE CONCEPT OF SEGREGATION IN ITS INTERPRETATION OF SECTION 55, AS SEPARATE, TO SUPPORT ITS RULING RESPECTING THE EXCLUSION OF THE INCOME AVERAGING PROVISIONS FROM THE COMPUTATION UNDER SECTION 55 OF THE ALTERNATIVE MINIMUM TAX, IS CONTRARY TO THE STATUTE AND THE UNDISPUTED FINDINGS OF THE TAX COURT.

Section 1304 of the Internal Revenue Code states:

"SPECIAL RULES

(a) TAXPAYER MUST CHOOSE BENEFITS- This part shall apply to the taxpayer only if the taxpayer chooses to have the benefit of this part for such taxable year. Such choice may be made or changed at any time before the expiration of the period prescribed for making a claim for credit or refund of the tax imposed by this chapter f r the taxable year.

(b) CERTAIN PROVISIONS INAPPLICABLE. If the taxpayer chooses the benefits of this part, the following provisions shall not apply to him for such year:

(1) Section 911 (relating to citizens or residents of the United States living abroad).

(2) Subpart b of Part III of subchapter N (sec. 931 and following, relating to income from sources within possessions of the United States.

* * * "

To refute the ruling of the Circuit Court that Section 55 is separate, appellant has annexed as Appendix G, that part of the Conference Report of the Congressional Committees respecting the enactment of the Alternative Minimum Tax for non-corporate taxpayers, which appellant

contends demonstates that Section 55 of the I.R.C. is not "separate" but that on the contrary that it is highly involved with many of the other sections of the Internal Revenue Code.

With respect to the interpretation of the Circuit Court that Section 55 is "separate" tax, it is to be noted that the said conference report states (Appendix G, p. 264):

> "Where the alternative minimum tax exceeds the regular tax, no credits generally will be allowable against the alternative minimum tax liability. However, certain refundable credits will be allowed against the alternative minimum tax (i.e., the credit for withheld taxes, the credit for refunds of gasoline and other fuel taxes, and the earned income credit), because the amounts involved would be available as refunds to the taxpayer in any event.
>
> Senate amendment- The senate amendment repeals the present minimum tax for individuals beginning in 1979 and establishes an alternative minimum tax, under which a taxpayer pays the alternative minimum tax only where it exceeds the taxpayer s regular income tax.

Generally, the tax base for the alternative minimum tax is taxable income plus the taxpayer s preference items for the year.

* * *

The amount of minimum tax is the amount by which the tax computed under this rate schedule exceeds the taxpayer s regular tax. Thus, although the tax is in effect a true alternative tax, in the sense that it is paid only when the amount computed under the schedule exceeds regular tax, technically the taxpayer s regular tax continues to be imposed and the amount of the alternative minimum tax is the excess of the amount computed under the minimum tax rate table over the amount of the regular tax."

(emphasis supplied)

IN THE LIGHT OF THE FOREGOING STATEMENTS IN THE AFORESAID CONGRESSIONAL CONFERENCE REPORT, IT WAS ERROR FOR THE CIRCUIT COURT AS WELL AS THE TAX COURT TO INTERPRET SECTION 55 OF THE INTERNAL CODE TO BE A SEPARATE TAX, SEPARATE AND APART FROM THE INCOME AVERAGING PROVISIONS AND THAT IN THE COMPUTATION OF ALTERNATIVE MINIMUM TAXABLE INCOME UNDER SECTION 55, THAT THE COMPUTATION IN APPELLEE s REVISED SCHEDULE G IN THE NAME OF APPELL-

ANT, INCORPORATED IN THE TAX COURT S DE CISIONS COULD BE EXCLUDED AND THAT THE COMPUTATION OF ADJUSTED GROSS INCOME COULD BE MADE WITHOUT INCLUDING THE FIND-INGS OF THE TAX COURT RESPECTING AVERAGE-ABLE INCOME, AND THAT IT WAS ERROR FOR THE LOWER COURTS TO MAKE A COMPUTATION AS THOUGH SAID SCHEDULE G, NEVER EXISTED, AND THE TAX COURT HAD NOT MADE THE FIND-INGS.

IT IS TO BE SIGNIFICANTLY NOTED THAT THE STOCKWELL AND RILEY CASES REFERRED TO BY THE TAX COURT AND THE CIRCUIT COURT MERELY RULED THAT THEY REJECTED THE NON-EXISTING STATUTORY CLAIMS OF THE TAX-PAYERS( THE RILEY CASE INVOLVING A NON-EXISTING CLIAM TO INCOME AVERAGING , AND THE STOCKMAN CASE INVOLVING A NON-EXISTING ~~CLA~~IM TO THE AVERAGING OF THE MINIMUM TAX UNDER THE OLD SECTION 56 (THE PREDECESSOR OF THE SAID SECTION 55).

APPELLANT EMPHASIS THAT IN NEITHER THE STOCKMAN NOR THE RILEY CASE DID THE COURT NEGATE THE STATUTORY IMPACT OF THE INCOME AVERAGING PROVISIONS OF THE INTERNAL REVENUE CODE.

APPELLANT CONTENDS THAT THE CIRCUIT COURT IN THE INSTANT CAUSE GOES FAR BEYOND THE RULINGS OF THE RILEY AND STOCKMAN CASES, AND THAT THE CIRCUIT COURT SUPPORTS COLLATERAL ATTACKS ON DIFFERENT PROVISIONS OF A STATUTE BY AN INTERPRETATION OF ONE STATUTE OR SOME ITS PRO- SUPPORTED BY INAPPLICABLE CASES TO NEGATE THE STATUTORY IMPACT OF OTHER SECTIONS OF THE SAME OR OTHER STATUTES.

APPELLANT CONTENDS THAT THE APPLICABILITY OF THE CIRCUIT COURT'S RULING HAS NO BOUNDARIES.

APPELLANT S COMPUTATION OF ALTERNATIVE MINIMUM TAXABLE INCOME BASED ON THE GIGURE OF $ 24,386 APPEARING IN APPELLEE S COMPUTATION IN REVISED TREASURY SCHEDULE G ARRACHED TO ITS COMPUTATION INCORPORATED IN THE DECISION OF THE TAX COURT, WHICH APPELLANT CONSIDERS AVERAGE ADJUSTED TAXABLE INCOME UNDER THE PROVISIONS OF THE INCOME AVERAGING OF THE INTERNAL REVENUE CODE (secs. 1301-1305):

| | |
|---|---|
| AVERAGE ADJUSTED gross income | $ 24,386.00 |
| Less: Zero bracket a,ount $1,700. | |
| $1,000 times the amount of exemptions 2,000. | ( 3,700.00 |
| | $ 20,686.00 |
| Capital gains deduction..... | 136,030.00 |
| | $156,716.00 |
| Less statutory exclusion.... | 10.000.00 |
| | $146,716.00 |
| Amount taxable at 10% $20,000. Tax | $ 2,000.00 |
| Amount taxable at 20% 20,000. Tax | 4,000.00 |
| Amount taxable at 25% 106,716 Tmax | 26,679.00 |
| Total A;ternative minimum tax | $ 32,679.00 |
| Regular Income Taxp Income Averaging | 32.494.00 |
| Alternative Minimum tax.....$ | 185.00 |

CONTINGENT CONSTITUTIONAL ISSUE

Appellant asserts the unusual circumstances herein as warranting clasdifying the constitutional issues, as contingent.

It is emphasized that initially the respondent's computer which had not been programmed to provide for 'income averaging', issued a computer print-out which made no provisions for the inclusion of appellant's Treasury Dept. Tax Form, Schedule G (Income Averaging)attached to appellant's tax form 1040, in the computation of adjusted gross income to be included in the computation of alternative minimum taxable income , and the result was a computation of adjusted gross income as though Schedule G (Income Averaging) did not exist.

Appellant contends that the statutory impact of the attaching of appellant s Schedule G (Income Averaging) to his tax form 1040 pursauant to the provisions of

the Internal Revenue Code and the Regulation of the Secretary of the Treasury evidencing his statutory election to average his income, had the statutory impact of the same force and effect as though Schedule G was part of the said tax form 1040, and that by reason of the statutory impact, that immediately upon the attachment of the said Schedule G, the adjusted gross income of the computer year (1980) and the base years were averagedas though the said tax returns were amended.

It is appellant's contention that Section 55(b)(1) of the I.R.C. is unconstitutional to the extent that it may be interpreted as asserted by the Circuit Court and the Tax Court and disputed by appellant . that the term 'adjusted gross income' appearing in said Section 55 (b)(1), authorizes the inclusion in the computation of the Alternative Minimum Taxable Income

initial adjusted gross income appearing in Tax Form 1040 (before income averaging under said Schedule G (Income Averaging), rather than the computed average income appearing in said Schedule G, incorporated in the Tax Court s decision, and as provided in the Internal Revenue Code(secs. 1301-1305), thereby directly or indirectly negating, nullifying and/or voiding the tax benefits of said Secs. 1301-1305; whereas taxpayers who have similar gross income but no preferential income subjecting them to the provisions of Sec. 55 of the I. R.C. retain the statutory tax benefits of income averaging.

## CONCLUSION

Appellant contends that the Ruling of the Circuit Court is ofgreat import not only that it affects all taxpayers similarly situated as the appellant, but that the applicability of the Circuit Court's ruling in the administration not only of the Internal Revenue Act but all statutes, cannot be over-emphasized.

The Circuit Court ruling negates the statutory impact of the income averaging provisions of the Internal Revenue Code (secs. 1301-1305) through its interpretation that Section 55 of the I.R.C. is separate and that its tax is separate and that income averaging provisions of the I. R. C. do not apply. In this manner the Circuit Court literally brushs aside the provisions of Section 1304, mandating the inapplicability of certain sections of the Internal Revenue Code with respect to the said income averaging provisions,

but excluding sec. 55 of the I.R.C., thus making said section 55 applicable, Thus the Circuit Court ruling e liminates the mandatory statutory provisions respecting inapplicability of said Section 1304, and substituting its interpretation of the rulings in the Stockman case (supra) and the Riley case (supra)to support its ruling of inapplicability of the income averaging provisions in the computation of the alternative minimum taxable income to be included in the computation of the alternative minimum tax.

In this manner the Circuit ruling negates the statutory tax benefits of income averaging(secs. 1301-1305, negates the inapplicability provisions of said section 1304, and finally approves the initial print-out of a computer which had made no provisions for the inclusion of the said appellant's schedule G (income averaging), the revised version of

which is incorporated in the tax Court's decision.

APPELLANT EMPHASIZES EMPHATICALLY THAT THE RILEY AND STOCKWELL CASES DID NOT NEGATE ANY STATORY PROVISIONS RESPECTING INCOME BUT MERELY RULED IN THE RILEY CASE THAT THERE WAS NO STATUTORY PROVISIONS FOR INCOME AVERAGING AND IN THE STOCKWELL CASE THE COURT RULED THAT THERE WAS NO STATUTORY PROVISIONS FOR THE AVERAGING OF THE MINIMUM TAX.

APPELLANT RESPECTFULLY CONTENDS THAT THE RULING OF THE CIRCUIT COURT HAS THE EFFECT OF SUBSTITUTING THE COURT S LEGISFOR THE STATUTORY MANDATE RESPECTING THE INAPPLICABILITY OF CERTAIN SECTIONS OF THE INTERNAL REVENUE CODE WITH RESPECT TO THE INCOME AVERAGING PROVISIONS AND SINCE SECTION 55 WAS NOT INCLUDED, THE CONCLUSIS THAT THE INCOME AVERAGING PROVISIONS OF THE I.R.C. APPLY TO SECTION 55 AND THE

CIRCUIT COURT HAD NO POWER TO BRUSH ASIDE MANDATORY PROVISIONS RESPECTING THE APPLICABILITY OF SECTION 55 AND BY AN INTERPRETATION OF SECTION 55 AND THE APPLICATION OF NON-APPLICABLE DECISIONS (THE RILEY AND STOCKWELL CASES) TO NEGATE THE APPLICABILITY OF INCOME AVERAGING PROVISIONS IN THE DETERMINATION OF THE ALTERNATIVE MINIMUM TAXABLE INCOME TO BE INCLUDED IN A BASE FOR THE COMPUTATION OF THE ALTERNATIVE MINIMUM TAX, AND THEREBY NEGATE THE STATUTORY TAX BENEFITS UNDER INCOME AVERAGINGPROVISIONS OF THE INTERNAL REVENUE CODE, AND THEREBY CREATE A TAX DEFICIENCY OF PRACTICALLY THE SAME AMOUNT, WHICH IS THE SUBJECT OF THIS APPEAL.

FOR THE FOREGOING REASONS, THE COURT SHOILD NOTE PROBABLE JURISDICTION.

Respectfully submitted,

SAMUEL OKIN,
Appellant,
# 241 Sands Avenue,
Las Vegas, Nevada, 89109,
702-735-0884

86-2039

NO. 87 -

Supreme Court, U.S.
FILED
APR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term , 1986

---

SAMUEL OKIN,

Appellant,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

---

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

## APPENDICES

SAMUEL OKIN,
Appellant,
241 Sands Avenue,
Las Vegas, Nevada 89109
(702) 735-0884

APPENDIX A

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| SAMUEL OKIN,<br>*Petitioner-Appellant,*<br>v.<br>COMMISSIONER OF INTERNAL REVENUE,<br>*Respondent-Appellee.* | No. 85-7594<br>Tax Court No. 24746-83<br>OPINION |

Submitted August 12, 1986*

Filed January 26, 1987

Before: Thomas Tang, Warren J. Ferguson and Cynthia Holcomb Hall, Circuit Judges.

Per Curiam

Appeal from Decision of the United States Tax Court

## SUMMARY

**Taxation**

Appeal from judgment of Tax Court. Affirmed.

Appellant Okin had a long-term capital gain in 1980. He computed his tax return by income averaging. He did not report any liability for the alternative minimum tax. On audit, the Tax Commissioner determined that he was defi-

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 3(f) and Fed. R. App. P. 34(a).

cient, in part, for not paying any alternative minimum tax. The Tax Court sustained the deficiency, rejecting Okin's claims that the alternative minimum tax should be computed on the basis of an adjusted average annual taxable income, and that the alternative minimum tax was an unconstitutional taking of property without due process of law and without adequate compensation.

[1] This court rejects Okin's argument that his alternative mimimum tax should be computed on the basis of his average annual adjusted taxable gross income. By the plain meaning of its text, the alternative minimum tax provision applies in addition to the other provisions. [2] Income averaging provisions do not alter the taxpayer's income for the given year. Rather, they reduce the rate at which that income is taxed. [3] Unlike the income-averaging provisions, the alternative minimum tax is imposed in addition to all other taxes imposed. [4] The alternative minimum tax is imposed to the extent it exceeds the regular tax. [5] This court finds that, although the imposition of the alternative minimum tax in this case virtually nullified Okin's tax savings by income-averaging, the result is not contrary to congressional intent. [6] The court also agrees with the Tax Court that analogy to the former minimum tax upon preference items supports the conclusion that income averaging does not apply to the minimum tax. [7] Okin also argues that the alternative minimum tax constitutes a taking of property without due process of law and without adequate compensation. [8] It is commonplace that the due process clause places no limits upon the congressional taxing power. [9] The court rejects Okin's argument that the Tax Court's interpretation violates the due process clause because it is discriminatory, finding a reasonable relation to a legitimate governmental end.

## COUNSEL

Samuel Okin, Las Vegas, Nevada, for the petitioner-appellant.

Department of Justice, Roger M. Olsen, Washington, D.C., for the respondent-appellee.

## OPINION

PER CURIAM:

Samuel Okin appeals from the Tax Court's determination of an $18,255.70 deficiency in income tax for the year 1980. Okin contends that the alternative minimum tax provision of I.R.C. § 55 (Supp. IV 1980)[1] should not be computed by starting with his adjusted gross income, but rather by starting with an "adjusted average annual taxable income" derived from the income averaging provisions of I.R.C. §§ 1301-1305 (26 U.S.C. §§ 1301-1305 (1982)). Okin observes that the implementation of section 55 may defeat the advantages of sections 1301-1305. He also claims that section 55, as construed by the Commissioner, constitutes an unconstitutional taking of property without due process of law and without adequate compensation. The Tax Court rejected Okin's statutory and constitutional claims. *Okin v. Commissioner*, 49 T.C.M. (CCH) 1315 (1985). We affirm.

### I

### FACTS

In 1980, Okin had a long-term capital gain of $226,718. On his federal tax return for that year he computed his taxes by income averaging, utilizing schedules G and TC. *See* I.R.C. §§ 1301-1305. Okin did not report any liability for the alternative minimum tax. *See* I.R.C. § 55.

[1]The version of section 55 applicable to the tax year 1980 can be found in 26 U.S.C. § 55 (Supp. IV 1980). The section for tax year 1980 can also be reconstructed from the historical notes appended to the current provision in the West Publishing and Lawyer's Cooperative versions of the Code.

On audit, the Commissioner determined that Okin was liable for $308.10 in additional section 1 taxes[2] and $17,947.60 in alternative minimum tax. Accordingly, he issued Okin a notice of deficiency for $18,255.70 in income taxes for the taxable year 1980.

Okin petitioned the Tax Court for a redetermination of the deficiency, asserting that the alternative minimum tax should not be computed by starting with his adjusted gross income, but rather by starting with an "adjusted average annual taxable income" derived from the income averaging provisions of I.R.C. §§ 1301-1305. He also claimed that the alternative minimum tax, as applied by the Commissioner, was an unconstitutional "taking of property without due process of law and without adequate compensation."

The Tax Court sustained the deficiency as determined by the Commissioner. The court followed its ruling in *Riley v. Commissioner*, 66 T.C. 141 (1976), which had rejected a similar interpretation of former I.R.C. § 56 (1976).[3] *Okin*, 49

[2]This addition results from the Commissioner's determination of inaccuracies on Okin's forms for I.R.C. § 1 taxes. This determination is not disputed on appeal.

[3]Former section 56 applied an add-on minimum tax to certain tax preference items. It was imposed in addition to the regular tax at a flat rate above a specified threshold amount. *See* 26 U.S.C. § 56 (1976). In contrast, the section 55 tax, enacted in 1978, is progressive and is imposed to the extent it exceeds the regular tax. *See* 26 U.S.C. § 55 (Supp. IV 1980) (the section as applicable to tax year 1980). Although section 56 is referred to as the "add-on minimum tax" to distinguish it from the "alternative minimum tax" of section 55, both sections are "add-on" provisions since they increase a taxpayer's liability over what is otherwise calculated under section 1.

In 1982, Congress reordered the sections, adding a tax on all preference items to section 55, which thus became the only add-on tax applicable to taxpayers other than corporations. Section 56 was amended to cover only corporations. *See* 26 U.S.C. §§ 55, 56 (1982). *See generally* B. Bittker & L. Lokken, *Federal Taxation of Income, Estates and Gifts* ¶ 113.3.12, at S111-40 to 42 (Supp. No. 3 1986).

T.C.M. (CCH) at 1319. The court in *Riley* had held that the add-on minimum tax on tax preference items of section 56 did not incorporate the income averaging provisions of sections 1301 through 1305. *See Riley*, 66 T.C. at 144. The court also rejected Okin's constitutional claims, relying on *Graff v. Commissioner*, 74 T.C. 743 (1980), *aff'd per curiam*, 673 F.2d 784 (5th Cir. 1982), and *Wyly v. United States*, 662 F.2d 397 (5th Cir. 1981). Okin timely appeals.

Two issues are presented for determination:

1. Did the Tax Court err in determining that income averaging may not be used to determine alternative minimum tax liability under I.R.C. § 55?

2. Is I.R.C. § 55 constitutional?

## II

## STANDARD OF REVIEW

Decisions of the Tax Court are reviewed on the same basis as decisions in civil bench trials in the United States District Courts. *Mayors v. Commissioner*, 785 F.2d 757, 759 (9th Cir. 1986). This court thus reviews de novo the Tax Court's interpretation and application of statutes. *Betson v. Commissioner*, 802 F.2d 365, 367 (9th Cir. 1986); *see also United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

## III

## DISCUSSION

### A. *Income Averaging and Alternative Minimum Tax*

#### 1. *Plain Meaning of Section 55*

Okin maintains that his alternative minimum tax should be computed not by starting with $99,432, the figure representing adjusted gross income, but rather with $25,105.28, which Okin refers to as his "average annual adjusted taxable gross income." This $25,105.28 figure is derived from Okin's computation of his section 1 tax under the income averaging provisions of sections 1301-1305.

[1] Okin's interpretation is incorrect. By the plain meaning of its text, the alternative minimum tax provision applies "in addition" to the other provisions. I.R.C. § 55. The income averaging provisions, by their terms, apply only to "the tax imposed by section 1." I.R.C. § 1301. The provisions are therefore separate. The reference to "gross income" in section 55(b)(1) is unambiguous; it does not refer to any adjusted figure. In fact, section 55 does not refer to sections 1301-1305, nor vice-versa.[4] Also, the provisions of sections 1301-1305 could have no effect on "gross income" because the income-averaging provisions are intended to adjust the rate of taxation, not the amount of gross income. *See generally* 4 B. Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.3.13 (1981).

---

[4]The forms themselves support this analysis. For 1980, form 6251 was used for computation of alternative minimum tax. On line 1, the adjusted gross income corresponds with Form 1040, line 32, which is the adjusted gross income prior to calculation of income-averaged income.

2. *Purpose of Alternative-Minimum Tax*

[2] I.R.C. §§ 1301-1305 allow income averaging for "the tax imposed by section 1." Income averaging is designed to ease the burden of a progressive tax-rate schedule on a taxpayer with widely fluctuating or rapidly rising income. 4 B. Bittker, *supra*, ¶ 111.3.13, at 111-70. The provisions do not alter the taxpayer's income for the given year. Rather, they reduce the rate at which that income is taxed. Thus, in a case such as Okin's, where a large capital gain is realized in one year, the provisions lower the tax rate in a compensatory fashion to equal, ideally, the rate(s) that would have applied had the income been spread evenly over the preceding base-period years and the tax year in question. *See generally id.*

[3] Unlike the income-averaging provisions, the alternative minimum tax provided by I.R.C. § 55 is not a section 1 tax. Rather it is imposed "in addition to all other taxes imposed by this title. . . ." I.R.C. § 55(a). This tax was fashioned to tax certain income which was not otherwise being taxed. Specifically, it was directed at taxpayers with, among other things, large amounts of net capital gain and either low amounts of ordinary income or offsetting losses. By enacting this tax, Congress intended for every individual to pay at least a reasonable minimum amount of tax with respect to large capital gains while nevertheless encouraging capital formation.

[4] The alternative minimum tax is imposed to the extent it exceeds the regular tax. I.R.C. § 55(a). It is computed by first determining the "alternative minimum taxable income." This term, as defined in section 55(b)(1), consists of taxable income, plus certain amounts that were allowable as deductions in other sections, including the net capital gain deduction. (This figure is enlarged in Okin's case by the inclusion of his capital gains.) An amount ranging from 10 to 25 percent of this figure (the tentative alternative minimum tax) is then compared to the "regular" income tax liability (the tax imposed by section 1, with adjustments, in Okin's case, the

tax using the income-averaging method). If the tentative alternative minimum tax exceeds the regular tax, "then there is imposed (in addition to all other taxes imposed by this title) a tax equal to the amount of such excess." I.R.C. § 55(a).

[5] The gravamen of Okin's complaint is that the Commissioner's computations under I.R.C. § 55 virtually nullify his tax savings under the income-averaging provisions. In this case section 55 does have that effect.[5] But this result is not contrary to congressional intent. Although section 55 increases Okin's total tax, his capital gain deductions overall decreased his total liability under sections 1 and 55 to almost one-third of what it would otherwise have been. Thus, both congressional concerns in enacting section 55—tax on gains and incentive for capital formation—are served. *See* 4 B. Bittker, *supra* p. 5, ¶ 111.3.12, at 111-67 to 68.

3. *Analogy to Section 56*

[6] We also agree with the Tax Court that, in addition to the plain meaning and purpose of section 55, analogy to the former minimum tax upon preference items supports the conclusion that income averaging does not apply to the minimum tax.[6] Other courts have reached that conclusion. *See Stockwell v. Commissioner*, 46 T.C.M. (CCH) 1196 (1983), *aff'd*, 736 F.2d 1051 (5th Cir. 1984); *Riley v. Commis-*

[5] The Tax Court noted that Okin's section 1 tax computed without income averaging would be $51,770 instead of $33,493.10. Thus, on his section 1 taxes, Okin would save $18,276.90 by income averaging. However, his tentative alternative minimum tax, as computed by the Commissioner, is $51,440.70. Since this amount is imposed to the extent it exceeds the regular tax, Okin's total liability (regular tax and alternative minimum tax) would be $51,770 without income averaging, compared with $51,440.70 with income averaging. Hence, the effect of the imposition of the alternative minimum tax is that by income averaging Okin saves only $329.30 instead of $18,276.90. *See Okin*, 49 T.C.M. (CCH) at 1318 n.10.

[6] *See supra* note 3 for an explanation of the relation of the preference tax (§ 56) to the minimum tax (§ 55).

*sioner*. 66 T.C. 141 (1976). The minimum tax imposed under former section 56, like section 55 here, was an "add-on" minimum tax imposed in addition to the ordinary tax of section 1. Application of the averaging provisions is equally inappropriate to section 55 as to section 56.

These two provisions are part of the same statutory scheme. The alternative minimum tax provisions of section 55 were enacted at the same time the minimum tax provisions of section 56 were amended. *See* 4 B. Bittker, *supra* p. 5, ¶ 111.3.12, at 111-67 to 68 (quoting *Joint Committee on Taxation, General Explanation of the Revenue Act of 1978*, 95th Cong., 2d Sess. 261-62 (1979)). The Joint Committee opined that the substitution of the alternative minimum tax for the "add-on" minimum tax of section 56 in the case of capital gains would better accomplish the purpose of the "add-on" tax. *Id.*

There is no indication that Congress intended a different rule to apply to section 55 than to section 56. Accordingly, the Tax Court correctly rejected Okin's contentions regarding the operation of section 56.

B. *Constitutionality of Section 55*

[7] Okin argues that the alternative minimum tax of I.R.C. § 55, as applied by the Commissioner, constitutes a "taking of property without due process of law and without adequate compensation." The Tax Court allowed Okin to raise this claim after trial by an amended petition, and quickly dispatched it. *Okin*, 49 T.C.M. (CCH) at 1320. We do so as well.

[8] It is commonplace that the due process clause ordinarily places no limits upon the congressional taxing power. *See A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44 (1934). As the Supreme Court noted in another context,

> [t]he claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process

> is both familiar and recurring, but the Court has consistently refused . . . to undertake the task of passing on the "reasonableness" of a tax that otherwise is within the power of Congress . . . .

*City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 373 (1974). Okin's claim of a taking in violation of due process is thus groundless.

Apparently hoping to fit his claim into the category of "rare and special circumstances" where due process limits the taxing power, *see A. Magnano Co.*, 292 U.S. at 44, Okin alleges that the Commissioner's and the Tax Court's interpretations of section 55 are "discriminatory." By discriminatory, Okin apparently means that in his case section 55 negates the effect of the averaging provisions. But that which Congress grants through the averaging provisions it may take away through the minimum tax. A classification of taxation is permissible if it has a reasonable relation to a legitimate governmental end. *Welch v. Henry*, 305 U.S. 134, 144 (1938). In enacting the minimum tax, Congress attempted to remedy general taxpayer distrust of the system growing from large numbers of taxpayers with large incomes who were yet paying no taxes. *See* 4 B. Bittker, *supra* p. 5, ¶ 111.3.11, at 111-60 to 61 (discussing the enactment of section 56); *see also id.* ¶ 111.3.12, at 111-67 to 68 (section 55 enacted to better serve the purposes that originally motivated the passage of section 56). Here, where the benefits of averaging were in part taken away by the minimum tax, we do not pretend to interfere in Congress's ordering of the tax system.[7]

We thus join a number of other courts in upholding the constitutionality of sections 55 and the related section 56. *See Wallach v. United States*, 800 F.2d 1121, 1123-24 (Fed. Cir.

[7]We note that Okin's total tax liability ($51,540) is only about 23% of his net long-term capital gain alone ($226,718). His is an odd case to raise a question of the fairness of Congress's allocation of the tax burden.

1986) (sections 55 and 56); *Wyly v. United States*, 662 F.2d 397, 403-06 (5th Cir. 1981) (section 56); *Graff v. Commissioner*, 74 T.C. 743, 765-67 (1980) (section 56), *aff'd per curiam*, 673 F.2d 784 (5th Cir. 1982). The section 55 alternative minimum tax is a rational means of obtaining a broad-based tax, and therefore is constitutional.

The decision of the Tax Court is

AFFIRMED.

APPENDIX B

T. C. Memo. 1985-199

UNITED STATES TAX COURT

SAMUEL OKIN, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 24746-83. Filed April 24, 1985.

Held: Income averaging cannot be used in computing alternative minimum tax under section 55, IRC, as in effect during 1980.

Samuel Okin, pro se.

Jeffrey Millward, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

DRENNEN, Judge: Respondent determined a deficiency of $18,255.70 in petitioner's 1980 Federal income tax. The sole issue for decision is whether petitioner may use a figure derived from the computation of his section 1 tax under the income

averaging provisions in order to determine his liability for the alternative minimum tax imposed by section 55.1/ Our findings of fact and opinion are combined for easier discussion.

Some of the facts have been stipulated by the parties and are so found. The stipulation of facts and the exhibits attached thereto are incorporated herein by this reference.

Petitioner Samuel Okin resided in Las Vegas, Nevada at the time he filed his petition in this case. Petitioner filed a Federal income tax return for the taxable year 1980 on which he elected the filing status of married filing separate return.

Petitioner's 1980 return reported a liability for the income tax imposed by section 1 (hereinafter referred to as the "section 1 tax") of $31,842. The correct section 1 tax liability as stipulated is $33,493, the amount determined by respondent in the notice of deficiency.

Petitioner's 1980 return reported no liability for the alternative minimum tax under section 55.

Petitioner had a net capital gain from the sale of stock in 1980 in the amount of $226,718. Petitioner's net capital gain deduction allowed by section 1202(a) and claimed on his return was $136,030.80.

The $136,030.80 net capital gain deduction is a tax preference item under section 57(a)(9)(A) for the purpose of determining petitioner's alternative minimum tax liability.

---

1/ All section references are to the Internal Revenue Code of 1954, as in effect during 1980.

Petitioner elected to compute his section 1 tax using the income averaging provisions of sections 1301-1305. For the purpose of the income averaging computation, petitioner's taxable income was $97,432,[2] his averageable income was $90,408.40, and his total base period income was $23,412. Petitioner's correct section 1 tax, using the income averaging provisions, is computed as follows:[3]

| | | |
|---|---|---|
| Taxable income | | $97,432.00 |
| Total base period income | $23,412 | |
| 30% of total base period income | | (7,023.60) |
| Averageable income | | 90,408.40 |
| 30% of base period income (item A) | $ 7,023.60 | |
| 20% of averageable income | 18,081.68 | |
| Total (item B) | 25,105.28 | |
| Plus Excess community income | 0 | |
| Total (item C) | 25,105.28 [4] | |
| Tax on item C | | 7,440.58 |
| Tax on item B | 7,440.58 | |
| Less: tax on item A | 927.45 | |
| Difference | 6,513.13 | |
| Difference multiplied by four | | 26,052.52 |
| Tax using income averaging method | | $33,493.10 |

Petitioner's section 1 tax computed without using the income averaging provisions would be $51,770.

---

[2] Petitioner had dividend income of $42,797, taxable capital gain income of $90,687, excess itemized deductions of $34,052, and was allowed two exemptions.

[3] Certain steps of the income averaging computation which are not relevant to this discussion have been deleted.

[4] The $25,105.28 figure is designated by petitioner as "adjusted average annual taxable income." Petitioner contends that this figure should be used as the starting point for computing his alternative minimum tax. (See discussion infra).

Respondent determined that in addition to the section 1 tax of $33,493, petitioner is liable for the alternative minimum tax in an amount of $17,947.60. Respondent computed petitioner's alternative minimum tax as follows:

| | | | |
|---|---|---|---|
| Corrected tax table income | | | $99,432 |
| Less: Zero bracket amount | | $ 1,700 | |
| Allowable exemptions (2) | | 2,000 | |
| Difference | | | (3,700) |
| | | | 95,732 |
| Plus: Adjusted itemized deductions | | 0 | |
| Capital gains deduction | | 136,030.80 | |
| | | | 136,030.80 |
| Alternative minimum taxable income | | | 231,762.80 |
| Amount taxable at 10% | 20,000.00 | Tax | 2,000.00 |
| Amount taxable at 20% | 20,000.00 | Tax | 4,000.00 |
| Amount taxable at 25% | 181,762.80 | Tax | 45,440.70 |
| Total tentative alternative minimum tax | | | 51,440.70 |
| Less: Regular income tax less tax credits | | | 33,493.10 |
| Alternative minimum tax | | | $17,947.60 5/ |

Section 55 imposes an alternative minimum tax on noncorporate taxpayers to the extent that it exceeds the taxpayer's "regular tax" computed without regard to section 55.6/

---

5/ These are the figures used in the notice of deficiency. See following for comments thereon.

6/ As effective during 1980, section 55 provides in pertinent part:

Sec. 55. ALTERNATIVE MINIMUM TAX FOR TAXPAYERS OTHER THAN CORPORATIONS.

(a) ALTERNATIVE MINIMUM TAX IMPOSED.--In the case of a taxpayer other than a corporation, if--

(footnote continued)

---

(footnote continued from previous page)

(1) an amount equal to the sum of--

(A) 10 percent of so much of the alternative minimum taxable income as exceeds $20,000 but does not exceed $60,000 plus

(B) 20 percent of so much of the alternative minimum taxable income as exceeds $60,000 but does not exceed $100,000, plus

(C) 25 percent of so much of the alternative minimum taxable income as exceeds $100,000, exceeds

(2) the regular tax for the taxable year,

then there is imposed (in addition to all other taxes imposed by this title) a tax equal to the amount of such excess.

(b) DEFINITIONS.--For purposes of this section--

(1) ALTERNATIVE MINIMUM TAXABLE INCOME.--The term "alternative minimum taxable income" means gross income--

(A) reduced by the sum of the deductions allowed for the taxable year,

(B) reduced by the sum of any amounts included in income under section 86 or 667, and

(C) increased by an amount equal to the sum of the tax preference items for--

(i) adjusted itemized deductions (within the meaning of section 57(a)(1), and

(ii) capital gains (within the meaning of section 57(a)(9)).

***

(2) REGULAR TAX.--The term "regular tax means the taxes imposed by this chapter for the taxable year (computed without regard to this section and without regard to the taxes imposed by sections 72(m)(5)(B), 402(e), 408(f), 409(c), and 667(b)) reduced by the sum of the credits allowable under subpart A of part IV of this subchapter (other than under sections 31, 39 and 43). For purposes of this paragraph, the amount of the credit allowable under such subpart shall be determined without regard to this section.

(3) TREATMENT OF ZERO BRACKET AMOUNT.--In the case of an individual who does not itemize his itemized deductions, the zero bracket amount shall be treated as a deduction allowed.

***

The alternative minimum tax was added by the Revenue Act of 1978[7/] in conjunction with the decision to exempt the capital gain deduction under section 1202 from the add-on minimum tax under section 56. The congressional intent behind these changes was to remove the disincentives to capital formation associated with the add-on minimum tax on capital gains preferences, yet ensure that individuals having high incomes but paying low regular taxes would still be subject to a reasonable amount of tax on their capital gains. See Joint Committee on Taxation, 95th Cong., 2d Sess., General Explanation of the Revenue Act of 1978, at 261-262 (1979), quoted in 4 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶111.3.12 (1981).

The alternative minimum tax is imposed on "alternative minimum taxable income" according to a rate schedule which (as effective in 1980) exempts the first $20,000 of alternative minimum taxable income, applies a 10 percent rate on amounts greater than 20,000 but less than $60,000, applies a 20 percent rate for amounts greater than $60,000 but less than $100,000, and applies a 25 percent rate for amounts exceeding $100,000. The tentative tax so computed is then compared to the regular tax (which includes the add-on minimum tax on tax preferences under section 56), and if the tentative tax is greater than the regular tax, such excess is imposed as a tax "in addition to all other taxes." Section 55(a).

---

7/ Pub. L. 95-600, 92 Stat. 2763.

The tax base for the alternative minimum tax imposed by section 55(a) is "alternative minimum taxable income," which is defined in section 55(b) as gross income, reduced by allowable deductions and by amounts included in income under sections 86 (relating to alcohol fuel credits) or 667 (relating to accumulation distributions from trusts), and increased by two tax preference items--adjusted itemized deductions (as defined in section 57(a)(1)) and capital gains (as defined in section 57(a)(9)). Section 57(a)(9) defines as an item of tax preference an amount equal to the net capital gain deduction determined under section 1202.

In accordance with this statutory scheme, respondent determined petitioner's alternative minimum tax liability by subtracting from his gross income of $133,484 allowable deductions in the amount of $34,052 to arrive at corrected "tax table income" of $99,432. This amount was further reduced by $3,700 to account for the zero bracket amount under section 63(d) and the deduction for personal exemptions under section 151. The resulting $95,732 figure was then increased by $136,030.80, the amount of petitioner's capital gains deduction, as provided by sections 55(b)(C)(ii) and 57(a)(9) to produce alternative minimum taxable income of $231,762.80. Respondent then determined the tentative alternative minimum tax to be $51,440.70[8/] which

---

8/ Although neither party has mentioned it, respondent's computation appears to us to contain both an error in addition and an erroneous application of the formula provided in the (footnote continued)

exceeded petitioner's regular income tax of $33,493.10 by $17,947.60, resulting in an alternative minimum tax of that amount.

Petitioner contends that his alternative minimum tax should be computed by starting not with the $99,432 figure used by respondent, but rather with a figure of $25,105.28 which petitioner refers to as his "adjusted average annual taxable income." This $25,105.28 figure is derived from the computation of petitioner's section 1 tax under the income averaging provisions of section 1301-1305.9/ In effect, petitioner argues that because he elected to use the income averaging provisions to compute his section 1 tax, he should also get the benefit of the income averaging in computing his alternative minimum tax.

---

(footnote continued from previous page)
statute.

First, the 3 figures used in the taxable brackets do not equal the alternative minimum taxable income figure of $231,762.80. They are $20,000, $20,000 and $181,762.80. The income in the third bracket taxed at 25% should be $191,762.80, if respondent's other figures are right, rather than $181,762.80.

Secondly, and more importantly, the brackets do not conform to the formula. As mentioned above, the first $20,000 of alternative minimum taxable income is not taxed; the next $40,000 ($20,000 to $60,000) is taxed at 10%; the next $40,000 ($60,000 to $100,000) is taxed at 20%; and the remaining $131,762 ($100,000 to $231,762.80) is taxed at 25%. This produces a tentative alternative minimum tax of $44,940.70 rather than the $51,440.70 arrived at by respondent. When the regular tax is deducted therefrom the alternative minimum tax is $11,447.60 rather than the $17,947.60 arrived at by respondent.

The parties should consider this in submitting proposed computations of deficiency under Rule 155.

9/ See income averaging computation and note 4, supra.

He argues strenuously that respondent's "erroneous computation" of his alternative minimum tax "nullifies" the benefit he received from the income averaging provisions, contrary to the specific terms of the Internal Revenue Code and to congressional intent.10/ Despite petitioner's impassioned plea for relief from this alleged unfairness, we find no merit to the arguments presented in his lengthy briefs.

The statutory scheme governing the imposition and computation of the alternative minimum tax is clear and precise, and leaves, on these facts, no room for interpretation. The starting point for the computation is "gross income," which is then decreased to account for the taxpayer's allowable deductions and increased by taxpayer's items of tax preference. Section 55(b)(1). Petitioner's attempt to substitute "average annual taxable income" (a term apparently of his own creation) for

---

10/ Petitioner's method of computing his alternative minimum tax results in no liability for that tax because the tentative alternative minimum tax ($32,859) does not exceed the regular income tax ($33,493). Petitioner also correctly observes that had he not elected to use the income averaging method to compute his section 1 tax, he would not be liable for any alternative minimum tax, due to the fact that his regular tax of $51,770 would exceed the tentative alternative minimum tax of $51,440.70. The fuel for petitioner's vehement arguments herein appears to be this perceived unfairness of having his benefits from income averaging negated by the alternative minimum tax. The heading for Point III of petitioner's reply brief states: "Respondent's Fallacious Contentions Encompass Untold Devastating Results and Consequences Almost Beyond Comprehension." (Petitioner's Reply Brief, p. 8).

"gross income" is without statutory foundation, and reflects a misunderstanding of the relationship (or lack thereof) between the alternative minimum tax and the income averaging provisions.

The alternative minimum tax imposed by section 55 is entirely separate from the section 1 tax. This is clear from the language of section 55(a) which states that "there is imposed (in addition to all other taxes imposed by this title) a tax equal to the amount of such excess." The alternative minimum tax is imposed and computed independently of the section 1 tax; the only relationship between these two taxes is that only the excess, if any, of the tentative alternative minimum tax over the taxpayer's "regular tax" (essentially the section 1 tax, with certain modifications as provided in section 55(b)(2)) is imposed as the alternative minimum tax. This feature distinguishes the alternative minimum tax under section 55 from the "add-on" minimum tax imposed by section 56.11/ It is clear from the statutory scheme that the method by which the section 1 tax is computed has no impact on the computation of the alternative minimum tax. Section 1301 specifically provides that the income averaging provisions apply to the "tax imposed by section 1." Thus, petitioner's use of the income averaging provisions to

11/ The add-on minimum tax no longer applies to noncorporate taxpayers. In §§ 201(a), 201(c) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97-248, 96 Stat. 411, Congress repealed the add-on minimum tax for individuals, and broadened the alternative minimum tax under section 55. See Conference Report on Tax Equity and Fiscal Responsibility Act of 1982, H. Rept. No. 97-760 at 473-476 (1982). 1982-2 C.B. 600, 602-609.

compute his section 1 tax is irrelevant to the computation of his alternative minimum tax. His contention that his election to use the income averaging provisions of sections 1301-1305 caused the figure $25,105.28 (derived from the income averaging computation) to be substituted for the $99,432 figure for the purposes of the alternative minimum tax computation is utterly without statutory foundation.12/

We find this issue to be controlled by our opinion in Riley v. Commissioner, 66 T.C. 141 (1976), in which we rejected a similar attempt to apply the income averaging provisions to an entirely independent minimum tax on items of tax preference. Although Riley involved the add-on minimum tax under section 56, the general statutory scheme and the critical statutory language are virtually identical to that of the alternative minimum tax in issue herein.13/ We think the following language in Riley is

12/ We feel it appropriate to recognize petitioner's remarkable tenacity and creativity in pressing his arguments in the face of this inflexible statutory scheme. His argument borders on the metaphysical; according to petitioner, when he attached the schedule electing income averaging to his return, his "adjusted gross income" was transformed, for all purposes, into "adjusted average annual taxable income" (the $25,105.28 figure). This unique approach to statutory construction is not tenable given the precise definitional provisions involved.

13/ The language of section 56(a) involved in Riley v. Commissioner, 66 T.C. 141 (1976), reads as follows: "In addition to all other tax imposed by this chapter, there is hereby imposed **** The taxes on items of tax preference imposed by sections 55 (the alternative tax) and 56 (the add-on tax) perform an identical function -- ensuring that taxpayers having high adjusted gross incomes, but paying little regular tax because of various tax preferences, are nevertheless subject to a reasonable amount of tax. See 4 B. Bittker, Federal Taxation of

(footnote continued)

equally apposite to the case at hand:

> The tax imposed by section 56 is specifically stated to be "in addition to the other taxes imposed by this chapter." Sections 56 through 58 appear to be a self-contained unit of taxation, whereas computation of the tax imposed by section 1 may involve the application of several other Code sections. The deductions, exclusions, and credits allowed in the computation of section 1 tax may not be utilized in the computation of the tax imposed by section 56 unless specifically provided.
>
> Sections 1301 through 1305 do not provide a mechanism by which the minimum tax on tax preference income may be averaged. Section 1301, on its face, has reference only to the tax imposed by section 1. In our opinion, if Congress had intended to allow income averaging in the computation of section 56 tax, it undoubtedly would have said so. We are unwilling to imply such an intent on the part of Congress.
>
> To apply sections 1301 through 1305 in the manner urged by petitioners would defeat the purpose behind section 56 since their tax preference items would entirely escape the additional tax imposed by that section. We think it was clearly the intention of Congress to make sure that such items were at least subjected to some minimum tax. [66 T.C. at 144]

We followed our opinion in Riley in Stockwell v. Commissioner, T.C. Memo 1983-520, which was recently affirmed by the Fifth Circuit. Stockwell v. Commissioner, 736 F.2d 1051 (5th Cir. 1984). In affirming the Tax Court in Stockwell the 5th Circuit noted:

> The Stockwells correctly note that in the Tax Reform Act of 1969, P.L. 91-172, Congress specifically amended the income averaging provision to include the

---

(footnote continued from previous page)
Income, Estates and Gifts, ¶¶ 111.3.11, 111.3.12 (1981). Both the sec. 55 tax and the sec. 56 tax are computed by reference to certain items of tax preference as defined in sec. 57. Although the computation and scope of these provisions differ, their effect -- to impose an additional tax on items of tax preference independent of the "regular tax" -- is identical. In fact, as a result of later modifications by Congress, the alternative minimum tax has been substituted for the add-on minimum tax in the case of noncorporate taxpayers. See note 11, supra.

> averaging of capital gains. From this linchpin, they reason that the minimum tax imposed by §56 likewise should be averagable. We cannot agree. Neither the language of the statute nor the legislative history supports that conclusion.
>
> ***
>
> *** Income averaging applies only to taxes imposed by §1, it does not apply to the minimum tax imposed by §56. [736 F.2d at 1052-1053].

We think these cases compel a decision for the respondent herein.

After the trial in this case was concluded, we permitted petitioner to file an amended petition raising the additional argument that section 55, as applied by respondent in this context, is unconstitutional. Petitioner's amended petition states several purported constitutional objections to the method by which respondent computed his alternative minimum tax.[14/] We find no merit to these objections, which are not supported by any specific references to the Constitution or citations to precedent. The constitutionality of the minimum tax under section 56 has been upheld. Wyly v. United States, 662 F.2d 397, 403-406 (5th Cir. 1981); Graff v. Commissioner, 74 T.C. 743, 765-767 (1980), affd. per curiam, 673 F.2d 784 (5th Cir. 1982). As we have discussed, the purpose and statutory scheme of the minimum tax under section 56 and the alternative minimum tax

---

14/ The amended petition alleges, among other things, that section 55 "discriminates" against petitioner and other taxpayers having preferential income and the right to elect to income average, and that section 55 as "interpreted" by respondent constitutes a "taking [of] substantial property of the taxpayer without due process of law and without adequate compensation."

under section 55 are quite similar,15/ and we think the thorough discussions in the aforementioned cases upholding the constitutionality of the minimum tax apply with equal force to the alternative minimum tax.

Decision will be entered under Rule 155.16/

15/ See note 13, supra.

16/ While we decide the sole issue in favor of respondent and would usually enter a decision for respondent in the amount of deficiency determined in the notice of deficiency, we will leave the amount of the decision open until the parties can determine whether respondent correctly computed the amount of the alternative minimum tax in accordance with the provisions of sec. 55(1). See note 8.

APPENDIX C

# United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES TAX COURT FILED

FEB 20 P3:26

SAMUEL OKIN,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE SERVICE,

Respondent-Appellee.

No. 85-7594 TAX Court No. 24746-83

JUDGMENT

Upon Petition to Review a Decision of The Tax Court of the United States.

This Cause came on to be heard on the Transcript of the Record from The Tax Court of the United States, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Tax Court of the United States in this Cause be, and hereby is AFFIRMED.

A TRUE COPY
ATTEST FEB 17 1987
CATHY A. CATTERSON
Clerk of Court
by: Deputy Clerk

Filed and entered JANUARY 26, 1987.

APPENDIX D

UNITED STATES TAX COURT

| | | |
|---|---|---|
| SAMUEL OKIN, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Docket No. 24746-83 |
| | ) | |
| COMMISSIONER OF INTERNAL REVENUE, | ) | |
| | ) | |
| Respondent. | ) | |

DECISION

Pursuant to the opinion of the Court filed April 24, 1985, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioner for the taxable year 1980 in the amount of $18,255.70.

(Signed) [illegible]

Judge.

Entered: AUG 14 1985

* * * * *

APPENDIX B

UNITED STATES TAX COURT
FILED
JUL 8 1985

UNITED STATES TAX COURT

| | | |
|---|---|---|
| SAMUEL OKIN, Petitioner, | ) | |
| v. | ) | Docket No. 24746-83 |
| COMMISSIONER OF INTERNAL REVENUE, Respondent. | ) | |

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached computation is submitted, on behalf of the respondent, in compliance with the Court's opinion determining the issues in this case, together with a proposed decision which is being lodged concurrently with said computation.

This computation is submitted without prejudice to respondent's right to contest the correctness of the decision entered herein by the Court.

FRED T. GOLDBERG, JR
Chief Counsel
Internal Revenue Service

Date: July 2, 1985

By: S. Clay Freed
S. CLAY FREED
District Counsel

OF COUNSEL:
BENJAMIN C. SANCHEZ
Regional Counsel
J. L. MILLWARD
Internal Revenue Service
P.O. Box 891
Reno, Nevada 89504
Tel. No. (702) 784-5741

CC: REN:JF:JTD

COMPUTATION STATEMENT

IN RE: SAMUEL OKIN
241 SANDS AVENUE
LAS VEGAS, NEVADA 89109

DOCKET NO. 24746-83

INCOME TAX

| YEAR | DEFICIENCY |
| --- | --- |
| December 31, 1979 | $18,255.70 |

THE DETAILS SUPPORTING THE ABOVE COMPUTATIONS ARE SET FORTH ON ATTACHED PAGES 2 THRU 6.

| FORM 886-A (REV. APRIL 1958) | EXPLANATION OF ITEMS | SCHEDULE NO. OR EXHIBIT |
|---|---|---|
| NAME OF TAXPAYER [illegible] ABLE | | YEAR/PERIOD ENDED 1980 |

INCOME AVERAGING - SCHEDULE 2

THE SECOND PRECEDING BASE PERIOD YEAR'S BASE PERIOD INCOME WAS INCORRECTLY COMPUTED IN THE NOTICE OF DEFICIENCY. THE CORRECT BASE PERIOD INCOME IS $4,993 NOT THE $7,993 AS SHOWN IN THE NOTICE OF DEFICIENCY.

| Form 5278 (Rev. May 1982) | Department of the Treasury – Internal Revenue Service **Statement — Income Tax Changes** | Return Form No. | Schedule No. |
|---|---|---|---|
| | | 1040 | 1 |

Name(s) of Taxpayer(s)

SAMUEL OKIN

☐ Notice of Deficiency ☒ Other (specify)
☐ Settlement Computation RULE 155

| | Tax Years Ended | | |
|---|---|---|---|
| 1. Adjustments to income | 12-31-80 | | |
| a. | | | |
| b. | | | |
| c. | | | |
| d. | | | |
| e. | | | |
| f. | | | |
| g. | | | |
| 2. Total adjustments | — | | |
| 3. a. ☒ Taxable income ☐ Adjusted gross income<br>b. As shown in: ☐ Tax table income<br>☐ Preliminary letter dated ____ ☒ Notice of deficiency dated 5-10-82 ☐ Return as filed | 97,432 | | |
| 4. ☒ Taxable income as revised ☐ Tax table income as revised<br>☐ Adjusted gross income as revised | 97,432 | | |
| 5. Tax from ☐ Tax tables ☒ Schedule 2 ☐ Tax rate schedules | 32,484 | | |
| 6. Alternative tax if applicable (from page ____) | | | |
| 7. Corrected tax liability (lesser of line 5 or 6) | 32,484 | | |
| 8. Less credits (specify) a. | | | |
| b. | | | |
| c. | | | |
| 9. Balance (line 7 less amounts on lines 8a through 8c) | 32,484 | | |
| 10. Plus a. Tax from recomputing prior year investment credit | | | |
| b. Self-employment tax | | | |
| c. ALTERNATIVE MINIMUM TAX - SCH. 3 | 18,957 | | |
| 11. Total corrected income tax liability (line 9 plus amounts on lines 10a through 10c) | 51,441 | | |
| 12. Total tax shown on return or as previously adjusted | 33,185 | | |
| 13. Increase ~~or decrease~~ in tax (difference between lines 11 and 12) | 18,256 * | | |
| 14. Additions to the tax (listed below) | | | |



* due to rounding. Amt limited to $18,

SCHEDULE 2.

HEDULE G
rm 1040)
artment of the Treasury
nal Revenue Service

# Income Averaging

▶See instructions on back.
▶ Attach to Form 1040.

1980
21

me(s) as shown on Form 1040
SAMUEL OKIN.

Your social security number
900 08 9222

| ase Period Income and Adjustments | (a) 1st preceding base period year 1979 | (b) 2d preceding base period year 1978 | (c) 3rd preceding base period year 1977 | (d) 4th preceding base period year 1976 |
|---|---|---|---|---|
| Enter amount from: Form 1040 (1977, 1978, and 1979)—line 34 Form 1040A (1977 and 1978)—line 10 | 5,018 | 6,498 | 11,879 | |
| Form 1040A (1979)—line 11 | | | | |
| a Multiply $750 by your total number of exemptions in 1977 and 1978 | | 1,500 | 1,500 | |
| b Multiply $1,000 by your total number of exemptions in 1979 | 2,000 | | | |
| Taxable income (subtract line 2a or 2b from line 1). If less than zero, enter zero | 3,018 | * 4,998 | 10,379 | 417 |
| Income earned outside of the United States or within U.S. possessions and excluded under sections 911 and 931 | | | | |
| On your 1980 Form 1040, if you checked box [2 or 5 enter $3,200; 1 or 4 enter $2,200; 3 enter $1,500] | | | | 1,600 |
| Base period income (add lines 3, 4 and 5) | 3,018 | * 4,998 | 10,379 | 2,017 |

| mputation of Averageable Income | | | | |
|---|---|---|---|---|
| Taxable income for 1980 from Schedule TC (Form 1040), Part I, line 3 | 7 | 97,432 | | |
| Certain amounts received by owner-employees subject to a penalty under section 72(m)(5) | 8 | | | |
| Subtract line 8 from line 7 | 9 | 97,432 | | |
| Excess community income | 10 | | | |
| Adjusted taxable income (subtract line 10 from line 9). If less than zero, enter zero | | | 11 | 97,432 |
| Add columns (a) through (d), line 6, and enter here | 12 | 20,412 | | |
| Enter 30% of line 12 | | | 13 | 6,124 |
| Averageable income (subtract line 13 from line 11) | | | 14 | 91,308 |

**If line 14 is $3,000 or less, do not complete the rest of this form. You do not qualify for income averaging.**

| mputation of Tax | | | | |
|---|---|---|---|---|
| Amount from line 13 | | | 15 | 6,124 |
| 20% of line 14 | | | 16 | 18,262 |
| Total (add lines 15 and 16) | | | 17 | 24,386 |
| Excess community income from line 10 | | | 18 | |
| Total (add lines 17 and 18) | | | 19 | 24,386 |
| Tax on amount on line 19 (see caution below) | | | 20 | 7,098 |
| Tax on amount on line 17 (see caution below) | 21 | 7,098 | | |
| Tax on amount on line 15 (see caution below) | 22 | 739 | | |
| Subtract line 22 from line 21 | 23 | 6,349 | | |
| Multiply the amount on line 23 by 4 | | | 24 | 25,396 |
| **Note:** *If no entry was made on line 8 above, skip lines 25 through 27 and go to line 28.* | | | | |
| Tax on amount on line 7 (see caution below) | 25 | | | |
| Tax on amount on line 9 (see caution below) | 26 | | | |
| Subtract line 26 from line 25 | | | 27 | |
| Tax (add lines 20, 24, and 27). Enter here and on Schedule TC (Form 1040), Part I, line 4 and check Schedule G box | | | 28 | 32,494 |

ion: Use Tax Rate Schedule X, Y or Z from the Form 1040 instructions to figure your tax on lines 20, 21, 22, 25 and 28. Do not use the tax tables.

SEE PAGE 4.

790-858

SCHEDULE 3

Form **6251** — Department of the Treasury, Internal Revenue Service

# Alternative Minimum Tax Computation

▶ See instructions on back
▶ Attach to Forms 1040, 1040NR, 1041 or 990-T (Trust).

**1980**
35

Name(s) as shown on tax return: SAMUEL, CHU

Identifying number: 900-05-8[illegible]

| | | | | | |
|---|---|---|---|---|---|
| 1 | Adjusted gross income from Form 1040, line 32 or Form 1040NR, line 33 (estates and trusts—see instructions) | | | 1 | 132498 |
| 2 | Deductions (applies to individuals only): | | | | |
| a | Enter amount from Form 1040, line 33 or Form 1040NR, line 37 | 2a | 34052 | | |
| b | On your 1980 Form 1040, if you checked Filing Status box. 2 or 5, enter $3,400; 1 or 4, enter $2,300; 3, enter $1,700 | 2b | 1700 | | |
| c | Multiply $1,000 by the total number of exemptions on Form 1040, line 7 | 2c | 2000 | | |
| d | Add lines 2a through 2c (estates and trusts, enter zero) | | | 2d | 37752 |
| 3 | Subtract line 2d from line 1 | | | 3 | 94746 |
| 4 | Tax preference items: | | | | |
| a | Adjusted itemized deductions | 4a | — | | |
| b | Capital gain deduction | 4b | 136031 | | |
| c | Add lines 4a and 4b | | | 4c | 136031 |
| 5 | Alternative minimum taxable income (add lines 3 and 4c) | | | 5 | 230777 |
| 6 | Enter $20,000 ($10,000 if married filing separately, or an estate or trust) | | | 6 | 10000 |
| 7 | Subtract line 6 from line 5. If zero or less, do not complete the rest of this form | | | 7 | 220777 |
| 8 | Enter the smaller of line 7 or $40,000 ($20,000 if married filing separately, or an estate or trust) | 8 | 20000 | | |
| 9 | Subtract line 8 from line 7 | 9 | 200777 | | |
| 10 | Enter the smaller of line 9 or $40,000 ($20,000 if married filing separately, or an estate or trust) | 10 | 20000 | | |
| 11 | Subtract line 10 from line 9 | 11 | 180777 | | |
| 12 | Enter 10% of line 8 | 12 | 2000 | | |
| 13 | Enter 20% of line 10 | 13 | 4000 | | |
| 14 | Enter 25% of line 11 | 14 | 45441 | | |
| 15 | Add lines 12, 13 and 14 | | | 15 | 51441 |
| 16 | Amount from Form 1040, line 47* (estates and trusts—see instructions) | 16 | 32404 | | |
| 17 | Minimum tax from Form 1040, line 49a (estates and trusts—see instructions) | 17 | | | |
| 18 | Tax from recomputing prior-year investment credit (from Form 1040, line 50) (estates and trusts—see instructions) | 18 | | | |
| 19 | Add lines 16 through 18 | | | 19 | 32404 |
| 20 | Alternative minimum tax (subtract line 19 from line 15). If zero or less, do not complete the rest of this form; otherwise, file this form with your tax return | | | 20 | 19037 |
| 21 | Foreign tax credit (see instructions) | | | 21 | |
| 22 | Subtract line 21 from line 20. Enter here and on Form 1040, line 49b (estates and trusts—see instructions) | | | 22 | 19037 |

*Do not include any tax from Form 4970, Form 4972, Form 5544, or any penalty tax under section 72(m)(5).

Form 6251 (1980)
PAGE 5

| FORM 886-A (REV. APRIL 1968) | EXPLANATION OF ITEMS | SCHEDULE NO. OR EXHIBIT |
|---|---|---|
| NAME OF TAXPAYER | | YEAR/PERIOD ENDED |
| [illegible] | | 1980 |

Footnote 8, page 9 of Opinion

In the first paragraph the court states that the three figures used in the taxable brackets do not equal the alternative minimum taxable income figure of $231,762.80, and that the income in the third bracket should be $191,762.80 instead of $181,762.80 as shown in the notice of deficiency. The alternative minimum tax computation as contained in the notice of deficiency was not prepared on the applicable form 6251 but was a computer print-out. The computer print-out did not show the exclusion of the first $10,000 of alternative minimum taxable income from alternative minimum tax (see page 5 line 6 of form 6251), but that $10,000 was automatically excluded from the computers computations. The $10,000 exclusion is allowed as per section 55 (a) (1) (A) and amplified by section 58 (a) for married filing separate returns. Accordingly, the amounts per the notice of deficiency are correct.

The court in the second paragraph of footnote 8 on page 9 notes that the first and second bracket amounts of $20,000 each contained in the notice of deficiency do not correspond to the $40,000 brackets as per section 55 (a) (1) (A) and (B). The section 55 (a) (1) (A) (B) brackets are further defined at Section 58 (a). Section 58 (a) states that in the case of a married individual who files a separate return for the taxable year, the amount determined under paragraph (1) of section 55 (a) shall be an amount equal to one-half of the amount which would be determined under such paragraph if the amount of the individual's alternative minimum taxable income were multiplied by 2. Consequently, the $20,000 bracket amounts as shown in the notice of deficiency are correct (see page 5 lines 8 & 10 of form 6251).

APPENDIE F

FILED

MAR - 2 1987

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
- - - - NINTH CIRCUIT - - - - - - - - -x

SAMUEL OKIN,

Appellant,

v.

Docket No. 85-7504

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

- - - - - - - - - - - - - - - - - - - - -x

NOTICE OF APPEAL

Notice is hereby given that SAMUEL OKIN, the appellant in the above-captioned appeal, hereby appeals to the United States Supreme Court from the decision and order of the United States Court of Appeals for the Ninth Circuit, dated and entered on the 20th of January, 1987, which decision and order affirmed the decision and order of the United States Tax Court, dated August 14, 1985, ordering and deciding that there is a deficiency in income tax due from the appellantin the amount of $ 18,255.70; and this appeal is from each and every part of said decision and order.

Dated: February 17, 1987.

Samuel Okin

.....

Samuel Okin, Appellant,
241 Sands Avenue,
Las Vegas, Nevada, 89109
702-385-0884

APPENDIX F(i)

FILED

MAR - 2 1987

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

- - - - - - - - - - - - - - - - - - - - - - - -x

SAMUEL OKIN,

Appellant,

v. Docket No. 85-7504

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

- - - - - - - - - - - - - - - - - - - - - - - - x

AMENDED NOTICE OF APPEAL

NOTICE is hereby given that SAMUEL OKIN, the appellant in the above-captioned appeal, hereby appeals to the United States Supreme Court from the decree of the United States Court of Appeals, Ninth Circuit, dated the 17th day of February 1987, and from the decision and order of the said Court of Appeals, dated January 26, 1987, which said decree, decision and order affirmed the decision and order of the United States Tax Court, dated August 14, 1985, ordering and deciding that there is a deficiency in income tax due from the appellant in the amount of $ 18,255.70; and this appeal is from each and every part of the said decree, decision and order of the said Court of Appeals.

Dated: February 20, 1987.

Samuel Okin

Samuel Okin, Appellant,
241 Sands Avenue,
Las Vegas, Nevada, 89109
735-0884

APPENDIX F(2)

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT
- - - - - - - - - - - - - - - - - - - - -x

SAMUEL OKIN,

Appellant,

V. Docket No. 85-7504

COMMISSIONER OF INTRENAL REVENUE,

Respondent.

- - - - - - - - - - - - - - - - - - - - -x

SECOND AMNEDED NOTICE OF APPEAL

NOTICE is hereby given that SAMUEL OKIN, the appellant in the above-captioned appeal, hereby appeals to the United States Supreme Court from the Judgment of the United States Court of Appeals , Ninth Circuit, filed and entered on 26th day of January, 1987, ordering and adjudging that the Decision of the Tax Court of the United States in this cause be Affirmed, which said Decision of said Tax Court is dated August 14,1985, ordering and deciding that there is a deficiency in income tax due from the appellant in the amount of $ 18,255.70; and this appeal is from each and every part of said Judgment of the said United States Court of Appeals, Ninth Circuit.

The United States Supreme Court has jurisdiction of this appeal under 28 U. S. C. Sec. 1254(2).

Dated: March 14, 1987.

Samuel Okin

.....

Samuel Okin, Appellant
# 241 Sands Avenue,
Las Vegas, Nevada, 89109
702-735-0484

## VI. MINIMUM AND MAXIMUM TAX PROVISIONS

### A. Minimum Tax Provisions

**81a. Minimum tax for individuals**

*House bill.*—Present law (sec. 56 of the Code) provides a minimum tax on certain tax preferences of individuals and corporations. The minimum tax for individuals amounts to 15 percent of the sum of an individual's (or estate or trusts's) tax preferences in excess of one-half of regular income taxes paid or, if greater, $10,000.

The tax preference items included in this base of the minimum tax for individuals are:

(1) Accelerated depreciation on real property in excess of straight-line depreciation;

(2) Accelerated depreciation on personal property subject to a lease in excess of straight-line depreciation;

(3) Amortization of certified pollution control facilities (the excess of 60-month amortization (sec. 169) over depreciation otherwise allowable (sec. 167));

(4) Amortization of railroad rolling stock (the excess of 60-month amortization (sec. 184) over depreciation otherwise allowable (sec. 167));

(5) Qualified stock options (the excess of the fair market value at the time of exercise over the option price);

(6) Percentage depletion in excess of the adjusted basis of the property;

(7) The deduction for long-term capital gains;

(8) Amortization of child care facilities (the excess of 60-month amortization (sec. 188) over depreciation otherwise allowable (sec. 167));

(9) Itemized deductions (other than medical and casualty loss deductions) in excess of 60 percent of adjusted gross income; and

(10) Intangible drilling costs on oil and gas wells in excess of the amount amortizable with respect to those costs and, for 1977, in excess of net income from oil and gas production.

The House bill removes capital gains as an item of tax preference subject to the existing 15-percent minimum tax. However, the bill provides for the imposition of an alternative minimum tax at a rate of 10 percent on one-half of a noncorporate taxpayer's net capital gains (not including any gain recognized on the sale of the taxpayer's principal residence), reduced by a $10,000 exemption, if this amount exceeds the taxpayer's regular tax liability as computed after the application of tax credits. The tax applies to individuals, estates and trusts.

Under the bill, noncorporate taxpayers who realize capital gains would compute their regular tax liability, and compare this amount with that calculated under the alternative minimum tax. These amounts would be compared prior to being increased by the amount,

if any, of the existing 15-percent minimum tax. For this purpose, regular tax liability is computed before subtraction of the credit for withheld tax (sec. 31), the credit for refunds of taxes on gasoline, etc. (sec. 39), and the earned income credit (sec. 43), but after the subtraction of other credits.

Where the alternative minimum tax exceeds the regular tax, no credits generally will be allowable against the alternative minimum tax liability. However, certain refundable credits will be allowed against the alternative minimum tax (i.e., the credit for withheld taxes, the credit for refunds of gasoline and other fuel taxes, and the earned income credit), because the amounts involved would be available as refunds to the taxpayer in any event.

*Senate amendment.*—The Senate amendment repeals the present law minimum tax for individuals beginning in 1979 and establishes an alternative minimum tax, under which a taxpayer pays the alternative minimum tax only where it exceeds the taxpayer's regular income tax.

Generally, the tax base for the alternative minimum tax is taxable income plus the taxpayer's preferences items for the year. This amount then is reduced by a $20,000 exemption and subject to the following minimum tax rates:

| | *Percent* |
|---|---|
| 0–$40,000 | 10 |
| $40–$80,000 | 20 |
| Over $80,000 | 25 |

The amount of minimum tax is the amount by which the tax computed under this rate schedule exceeds the taxpayer's regular tax. Thus, although the tax is in effect a true alternative tax, in the sense that it is paid only when the amount of tax computed under the above schedule exceeds regular tax, technically the taxpayer's regular tax continues to be imposed and the amount of alternative minimum tax is the excess of the amount computed under the minimum tax rate table over the amount of the regular tax.

The provision then allows a foreign tax credit and the refundable credits against this tax is the amount in excess of the taxpayer's regular tax.

In general the preferences for purposes of the new alternative minimum tax are the same as under present law. The preference for excluded gain from the sale or exchange of a capital asset is increased, however, to conform to the higher capital gains deduction. (This change in the capital gains preference also is made with respect to the increased deduction provided for gains from sales or exchanges occurring in November and December 1978, which is treated as a preference under the present law minimum tax.) Also, gain from the sale of principal residences is not included as a preference under the alternative minimum tax (or under the add-on minimum tax for sales in November or December 1978).

In addition, the amendment makes permanent the preference for intangible drilling costs in excess of oil income as modified by the Tax Reduction and Simplification Act of 1977 and as agreed to by both the House and Senate in their versions of the energy tax legislation of this Congress. Under the amendment, intangible drilling cost deductions for oil and gas wells would be included in the minimum

tax base of individuals only to the extent that intangible drilling and development costs, over the amount of those costs amortizable on the basis of a 10-year life or under cost depletion, exceed the net taxpayer's income from oil and gas properties.

In addition, the amendment significantly modifies the preference for adjusted itemized deductions. Under the amendment, itemized deductions (as under present law) plus State and local tax deductions and, in the case of income in respect of decedents, amounts deducted (under sec. 691(c)) for estate taxes. The remaining itemized deductions are preferences to the extent they exceed sixty percent of adjusted gross income minus the medical and casualty deductions, State and local taxes and the estate tax described above.

The provision contains two special elections to allow taxpayers to avoid claiming an item of tax preference to reduce their regular tax. First, the amendment allows a taxpayer, in the manner prescribed by the Secretary, to elect to capitalize intangible drilling costs with respect to any oil and gas property. This property by property election replaces the election under present law which once made by a taxpayer applies for all oil and gas properties for all years of that taxpayer. Second, the amendment includes a provision allowing any recipient of a stock option which continues to meet the requirements for preferential treatment provided in secs. 422 or 424 of the Code) under transitional rules provided in the 1976 Tax Reform Act to be treated as nonqualified options and taxed under section 83 of the Code.

Finally, the amendment provides that certain charitable lead trusts which received transfers of property prior to January 1, 1977, would not be subject to the preference for adjusted itemized deduction for contributions attributed to that property.

The amount of income subject to the alternative minimum tax is gross income reduced by all deductions (other than any net operating loss deduction) and by any nonpreferential net operating loss and increased by the amount of tax preferences. This net amount, reduced by a $20,000 exemption is subject to the alternative minimum tax rates described above.

The alternative minimum tax is paid only to the extent that it exceeds an individual's regular tax. A taxpayer's regular tax means the taxes imposed by chapter 1 of the Code other than the alternative minimum tax and the penalty taxes applicable in certain circumstances. These taxes are to be reduced by all nonrefundable credits including the foreign tax credit (sec. 33). Thus, taxpayers paying the alternative minimum tax are not to obtain the benefit of nonrefundable credits other than the foreign tax credit to the extent of that taxpayer's alternative minimum tax. However, the amendment provides that in the case of certain credits, any credit carryovers to future years from a year in which the taxpayer is liable for some amount of alternative minimum tax are not to be reduced to the extent of the taxpayer's alternative minimum tax liability.

The foreign tax credit is to be allowed against the alternative minimum tax. Under the provision the amount of credit allowed is to be determined under the normal foreign tax credit limitation rules (sec. 904), but the computation of the limit is to be modified to include preference items which are added back in computing income

subject to minimum tax. Thus, a taxpayer's foreign source income on which foreign tax credits are allowed is to be increased by any preference attributable to foreign sources (or, in the case of deduction preferences, those properly allocated or apportioned to foreign source income) and a taxpayer's entire taxable income is to be increased by all preferences.

Under special rules for net operating losses, a taxpayer's income for alternative minimum tax purposes is to be reduced by net operating loss deductions only to the extent of the taxpayer's "nonpreferential net operating loss deduction," which is defined as the net operating loss deduction computed without regard to items preference included in that deduction. Thus, a taxpayer is allowed to reduce income subject to the new alternative minimum tax only by any net operating loss deduction to the extent of nonpreference losses making up the deduction.

The provision also includes special rules for the application of the alternative minimum tax in the case of trusts. First, the $20,000 exemption from the tax is to be allocated in the case of trusts. Second, in the case of a trust making current distributions of tax preferences which are items of deductions other than depletion and depreciation (e.g., intangible drilling costs) are to be allocated to beneficiaries where appropriate under regulations prescribed by the Secretary. (Of course, a trust is to receive the same deduction for alternative minimum tax purposes for the amount of income currently distributed as is received for regular tax purposes.)

Finally, in the case of accumulation distributions from a trust, the amount of taxes deemed imposed on the trust is not to be increased by any alternative minimum tax in excess of the trust's regular tax liability. Thus, no credit is available to pay any beneficiary of an accumulation distribution for any minimum tax paid by the trust with respect to that distribution; however, under the normal trust rules, no amount received by that beneficiary is treated as an item of tax preference to the beneficiary.

In general, the provision is effective for taxable years beginning after 1978. In addition, the provision is not to be treated as a change of the rate of tax (under sec. 21 of the Code). Thus, fiscal year taxpayers are to first be subject to the new minimum tax for their taxable year beginning in 1979.

However, the provisions changing the effective date for the preferences for capital gains (to 60 percent of net capital gain) for purposes of the present law minimum tax is to apply for all sales or exchanges taking place after October 31, 1978.

For purposes of both effective dates payments received after the effective date with respect to pre-effective date installment sales are to be taxed under the new provisions applicable generally to sales made after the effective date.

*Conference agreement.*—The conference agreement adopts a modified form of the provisions contained in the House bill and the Senate amendment. It retains the present law minimum tax with respect to all preference items except the deducted amount of capital gains and excess itemized deductions. In addition, it provides for an alternative minimum tax which is paid by an individual only to the extent that it

exceeds regular tax paid as increased by the present add-on minimum tax. Under the conference agreement, noncorporate taxpayers would compute regular tax liability and increase it by the amount of any add-on minimum tax liability. This sum then would be compared to the amount of tax computed under the alternative minimum tax formula. The alternative minimum tax, the computation of which generally follows that contained in the Senate amendment, is based on the sum of an individual's taxable income (as computed under present law), adjusted itemized deductions, and the amount of any capital gains deduction. This total would be subject to the tax rates contained in the Senate amendment. If liability computed under the alternative minimum tax exceeds that calculated under the present regular income tax, as increased by the present add-on minimum tax, the individual would pay the greater amount.

For the alternative minimum tax the conference agreement adopts the exemption, rates, and computation methods contained in the Senate amendment. In addition, it follows the Senate amendment's definition of adjusted itemized deductions. Thus, under the conference agreement, itemized deductions subject to the preference would exclude medical and casualty deductions (as under present law) plus State and local tax deductions, and, in the case of income in respect of decedents, amounts deducted (under section 691(c)) as estate taxes. The remaining itemized deductions are preferences only to the extent that they exceed 60 percent of adjusted gross income reduced by the medical and casualty deductions, State and local taxes, and the estate tax deduction previously described.

The conference agreement also retains those provisions of the Senate amendment which relate to certain charitable lead trusts and tax credits. Thus, the foreign tax credit is to be allowed against the alternative minimum tax. However, individuals paying the alternative minimum tax are not to obtain the benefit of nonrefundable credits other than the foreign tax credit to the extent of that individual's alternative minimum tax. Investment credit and jobs credit carryovers to future years, from a year in which the taxpayer is liable for some amount of alternative minimum tax, are not to be reduced to the extent the alternative minimum to the extent the alternative minimum tax liability reduced the benefit of these credits.

In the case of trusts and estates, the conference agreement provides special rules for the reduction of the exemption and the treatment of preference items.

Because the conference agreement retains the present add-on minimum tax with respect to deferral preferences, the agreement does not adopt that part of the Senate amendment which would allow new elections in the case of intangible drilling costs and stock options.

The conference agreement makes permanent the preference for intangible drilling costs in excess of oil income which was adopted for 1977 by the Tax Reduction and Simplification Act of 1977. Under the conference agreement, intangible drilling costs deductions would be included in the minimum tax base of individuals only to the extent that those costs, over the portion of those costs amortizable on the basis of a 10-year life or under cost depletion, exceed the taxpayer's income from oil and gas properties. Income from oil and gas properties

is to be determined first with regard to the rules for determining gross income from oil and gas properties for purposes of percentage depletion (sec. 613(a) of the Code, without regard to the limitations under sec. 613A). Net income from oil and gas properties is gross income from those properties reduced by the amount of deductions (other than intangible drilling costs subject to the preference) properly attributable to that gross income. The conferees also clarified that under the provision deductions attributable to properties with no gross income are not to be taken into account for purposes of computing net income from oil and gas properties.

The conference agreement follows the House bill and the Senate amendment in providing that no amount of gain from the sale of principal residence is included as a preference item under the alternative minimum tax (or under the present minimum tax for sales in November and December, 1978).

The capital gains preference is conformed to the increased capital gains deduction provided in the conference agreement. (This change in the capital gains preference also is made with respect to the increased deduction allowed for gains from sales or exchanges occurring in November and December 1978, which is treated as a preference under the present law minimum tax.)

In general, the conference agreement is effective for taxable years beginning after 1978. In addition, the provision is not to be treated as a change of the tax rate (under sec. 21 of the Code). Consequently, fiscal year taxpayers are to be subject first to the alternative minimum tax for their taxable years beginning in 1979. The conference agreement provisions changing the effective date for the capital gains preference (to 60 percent of net capital gain) for purposes of the present minimum tax is to apply for all sales and exchanges taking place after October 31, 1978.

For purposes of both effective dates, payments received after the effective date with respect to pre-effective date installment sales are to be taxed under the new provisions applicable generally to sales made after the effective date. (emphasis supplied)

**81b. Corporate minimum tax**

*House bill.*—Under present law, a 15 percent minimum tax is imposed on the sum of a corporation's tax preferences less the greater of $10,000 or the full amount of the corporation's regular tax. Generally, the tax preference items are the same for corporations as they are for individuals. However, corporate minimum tax preference items differ in the following respect: (1) the capital gains preference is 18/48th of net capital gains, (2) certain reserves for losses on bad debts of financial institutions are preference items, and (3) the individual preferences for itemized deductions, accelerated depreciation on leased personal property, and intangible drilling costs do not apply to corporations.

The House bill, for taxable years beginning after December 31, 1978, eliminates corporate capital gains as an item of tax preference.

*Senate amendment.*—No provision.

*Conference agreement.*—The conference agreement does not contain this provision, and thus corporate capital gains remain an item of tax preference.